No. 97-371-CFX Title: National Endowment For The Arts, et al., Petitioners
v.
Karen Finley, et al.

Docketed: September 3, 1997 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jul 18 1997	Application (A97-68) to extend the time to file a petition for a writ of certiorari from July 30, 1997 to August 29, 1997, submitted to Justice O'Connor.
	Jul 23 1997	Application (A97-68) granted by Justice O'Connor extending the time to file until August 29, 1997.
	Aug 29 1997	Petition for writ of certiorari filed. (Response due October 31, 1997)
	Aug 29 1997	Appendix of petitioner filed.
	Sep 25 1997	Order extending time to file response to petition until October 31, 1997.
	Oct 31 1997	Brief of respondents Karen Finley, et al. in opposition filed.
	Nov 12 1997	DISTRIBUTED. November 26, 1997
	Nov 20 1997	Reply brief of petitioners National Endowment for the Arts, et al. filed.
	Nov 26 1997	Petition GRANTED. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before, 3 p.m., Friday, January 9, 1998. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 6, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 6, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 31, 1998. **********
	Jan 5 1998	Brief amicus curiae of Morality in Media, Inc. filed.
	Jan 8 1998	Brief amicus curiae of Liberty Counsel filed.
	Jan 9 1998	Joint appendix filed.
	Jan 9 1998	Brief of petitioners National Endowment for the Arts, et al. filed.
	Jan 9 1998	LODGING consisting of ten copies of Exhibit B and Exhibit F to Cole Delclaration submitted by the Solicitor General.
	Jan 9 1998	LODGING consisting of ten copies of 8 1/2 x 11 blue brochure entitled National Endowment for the Arts Grants to Organizations 1999, submitted by the Solicitor General.
	Jan 9 1998	Brief amicus curiae of National Family Legal Foundation (To BE Reprinted) filed.
	Jan 9 1998	Brief amicus curiae of American Center for Law Justice filed.
	Feb 5 1998	LODGING consisting of twenty copies of a letter from General Andrew Fois to Sidney Yates, 10/5/95, submitted by counsel for the respondents.
	Feb 6 1998	Motion of Family Research Institute of Wisconsin for

No. 97-371-CFX

Entry	Date	Proceedings and Orders
		leave to file a brief as amicus curiae filed.
	Feb 6 1998	Brief of respondents Karen Finley, et al. filed.
	Feb 6 1998	Brief amici curiae of New School for Social Research, et al. filed.
	Feb 6 1998	Brief amici curiae of Claes Odlenburg, et al. filed.
	Feb 6 1998	Brief amicus curiae of Americans United for Separation of Church and States filed.
	Feb 6 1998	Brief amici curiae of American Association of University Professors, et al. filed.
	Feb 6 1998	Brief amici curiae of Volunteer Lawyers for the Arts, et al. filed.
	Feb 6 1998	Record filed.
	Feb 6 1998	Brief amicus curiae of Rockefeller Foundation filed.
	Feb 6 1998	Brief amicus curiae of Twenty-Six Arts, et al. filed.
	Feb 23 1998	Motion of Family Research Institute of Wisconsin for leave to file a brief as amicus curiae GRANTED.
	Feb 23 1998	CIRCULATED.
	Mar 4 1998	Record filed.
	Mar 6 1998	Reply brief of petitioners National Endowment for the Arts, et al. filed.
	Mar 31 1998	ARGUED.
	Apr 10 1998	Motion of respondents for leave to file a supplemental brief after argument filed.

PETITION FOR WRIT OF CERTIORARI

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FILED

97-371 AUG 29 1997

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Foundation on the Arts and the Humanities Act authorizes the National Endowment for the Arts (NEA) to make monetary grants-in-aid that enable qualifying groups and individuals to undertake a variety of projects related to the arts.. The Act provides that, when issuing regulations and establishing procedures governing the grant application process, the Chairperson of the NEA shall ensure that

> artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. 954(d)(1). The question presented in this case is whether the statutory direction that the Chairperson shall "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" is unconstitutional on its face under the First Amendment and the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioners are the National Endowment for the Arts and Jane Alexander, in her official capacity as Chairperson of the National Endowment for the Arts. Respondents are Karen Finley, John Fleck, Holly Hughes, Tim Miller, and the National Association of Artists' Organizations.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the National Endowment for the Arts, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 100 F.3d 671. The memorandum opinion of the district court (Pet. App. 48a-89a) is reported at 795 F. Supp. 1457. The order of the court of appeals denying the petition for rehearing (Pet. App. 90a-95a) is reported at 112 F.3d 1015.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1996. A petition for rehearing was denied on May 1, 1997. Pet. App. 90a-95a. On July 23, 1997, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment states in relevant part:

> Congress shall make no law * * * abridging the freedom of speech.

The Fifth Amendment states in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

Section 5(d) of the National Foundation on the Arts and the Humanities Act of 1965 (NFAH Act), states in relevant part:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and

> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. * * *.

20 U.S.C. 954(d). Other relevant provisions of the NFAH Act are appended (Pet. App. 96a-105a).

STATEMENT

Congress established the National Endowment for the Arts (NEA) to provide federal support, including funding, for artistic undertakings. See National Foundation on the Arts and the Humanities Act of 1965 (NFAH Act), Pub. L. No. 89-209, 79 Stat. 845, 20 U.S.C. 951 *et seq.* In 1990, Congress amended Section 5(d) of the NFAH Act to provide that the Chairperson's regulations and procedures shall ensure that "artistic excellence and artistic merit" are the criteria on which applications are judged, taking into consideration "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. 954(d)(1). Respondents, who consist of four individual performance artists and an association of artists' organizations, brought a legal challenge to that provision, arguing that it constitutes a facial violation of the First Amendment and the Due Process Clause of the Fifth Amendment. The United States District Court for the Central District of California agreed and invalidated the provision. A divided court of appeals affirmed that judgment.

1. Congress created the National Foundation on the Arts and the Humanities to "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States." NFAH Act § 4(b), 20 U.S.C. 953(b). Congress organized the NEA as a part of the Foundation. See NFAH Act § 5(a), 20 U.S.C. 954(a). Congress directed the NEA to "establish and carry out a program of * * * grants-in-aid" to qualifying applicants. NFAH Act § 5(c), 20 U.S.C. 954(c). Those grants-in-aid, which are distributed on a limited basis under selective criteria, are intended to support "groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts," in enumerated categories of artistic productions, projects, and workshops. See NFAH Act § 5(c), 20 U.S.C. 954(c).[1]

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[1] The NFAH Act originally identified five such categories. See NFAH Act § 5(c), 79 Stat. 846-847. Since 1965, Congress has modified and enlarged the categories to include the following:

> (1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;
>
> (2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons;
>
> (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;

Congress necessarily vested the National Endowment for the Arts with considerable discretion in the administration of the grants-in-aid program, which depends on a case-by-case evaluation of applications, is subject to available appropriations, and can provide funding to only a small fraction of the applicants who seek public support. Congress has authorized the Chairperson of the Endowment "to prescribe such regulations as the Chairperson deems necessary governing the manner in which the Chairperson's functions shall be carried out." NFAH Act § 10(a)(1), 20 U.S.C. 959(a)(1). The Chairperson has codified regulations governing certain agency operations, see 45 C.F.R. Pt. 1150 (1996), but sets forth most of the

---

> (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;
>
> (5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts;
>
> (6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;
>
> (7) programs for the arts at the local level;
>
> (8) projects that enhance managerial and organizational skills and capabilities;
>
> (9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and
>
> (10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

See NFAH Act § 5(c)(1)-(10), 20 U.S.C. 954(c)(1)-(10). The Act defines many of the relevant statutory terms, including "the arts," "production," "project," and "workshop." NFAH Act § 3(b), (c), (d), and (f), 20 U.S.C. 952(b), (c), (d), and (f).

guidance on the grant-in-aid application and selection process through more informal means, such as application guidelines, which are provided on request to grant applicants.

Since 1965, Congress has occasionally amended the NFAH Act to provide, among other things, legislative guidance with respect to the administration of the grants-in-aid program. See, *e.g.*, Arts, Humanities, and Museums Amendments of 1990 (1990 Amendments), Pub. L. No. 101-512, 104 Stat. 1960. The 1990 Amendments are of particular interest in this case. Before 1990, the Chairperson had made the ultimate decisions on grant applications, see NFAH Act § 5(c), 20 U.S.C. 954(c) (1988), based on the recommendations of a 26-member National Council on the Arts (Council), see NFAH Act § 6, 20 U.S.C. 955 (1988), and the optional utilization of experts, including peer review panels, see NFAH Act § 10(a)(4), 20 U.S.C. 959(a)(4) (1988). Until 1990, Section 5(d) of the NFAH Act simply provided as follows:

> No payment may be made to any group under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations and procedures established by the Chairperson.

20 U.S.C. 954(d) (1988).

The 1990 Amendments modified Section 5(d) to state in relevant part as follows:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that —
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
>
> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. * * *.

20 U.S.C. 954(d). The 1990 Amendments, among other things, also modified the provisions governing the use of experts and consultants by generally requiring the Chairperson to "utilize advisory panels to review applications, and to make recommendations to the National Council on the Arts." NFAH Act § 10(c), 20 U.S.C. 959(c) The 1990 Amendments also directed the Chairperson to issue regulations and establish procedures to ensure that those panels reflect "diverse artistic and cultural points of view" and include "representation of lay individuals who are knowledgeable about the arts." NFAH Act § 10(c)(1) and (2), 20 U.S.C. 959(c)(1) and (2).

The 1990 Amendments were prompted in part by public objections to certain controversial artistic projects that had received NEA funding. The objections focused on a career retrospective exhibit of Robert Mapplethorpe's works, which included homoerotic photography, and an exhibit (funded by a subgrant to a visual art center) that included Andres Serrano's "Piss Christ," a photograph of a crucifix immersed in the artist's urine. See, *e.g.*, 135 Cong.

Rec. 9788-9789, 10,323-10,325, 14,431-14,433 (1989). Congress's amendment of Section 5(d) of the NFAH Act reflected a compromise among various perspectives on whether and how to impose greater control over the grant-in-aid award process. See, *e.g.*, 136 Cong. Rec. H9406-H9463 (daily ed. Oct. 11, 1990) (debates on proposed amendments); 136 Cong. Rec. H9673-H9684 (daily ed. Oct. 16, 1990) (same).

2. The four individual respondents in this case had filed applications for federal grants-in-aid under the NEA's Solo Theater Artists Category at the time that Congress was considering the 1990 Amendments. The NEA denied their applications, and they brought suit in district court, alleging, among other things, that the NEA had violated the First Amendment and the NFAH Act by denying their applications on political grounds. After Congress enacted the 1990 Amendments, the artists' association joined the individual respondents in an amended complaint alleging that Section 5(d)(1)—which provides for "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public"—facially violates the First and Fifth Amendments. See Pet. App. 48a-49a, 53a-54a.

3. The government moved for judgment on the pleadings with respect to the individual respondents' claims relating to the government's denial of their grant applications. The district court denied the government's motion except in one minor respect, Pet. App. 56a-69a, and the government and the individual respondents ultimately settled those claims. At the same time that the government moved for judgment on the pleadings, respondents moved for summary judgment on their facial constitutional challenge to Section 5(d)(1). The district court granted that

motion and enjoined the NEA from enforcing the language added by the 1990 Amendments. See Pet. App. 69a-88a.[2]

The district court began by rejecting the government's construction of Section 5(d)(1). The government had argued that Section 5(d)(1) did not necessarily require the Chairperson to make specific "decency and respect" determinations in awarding grants and, accordingly, that any constitutional issue arising from such a construction could be avoided. See Pet. App. 74a-75a. The government specifically cited the NEA's determination that it could satisfy Section 5(d)(1) by structuring the grant selection process, including the provision for diverse composition of advisory panels, so that general standards of decency and respect for diverse beliefs and values of the American public would be implicitly reflected in the consensus judgments of the decisionmakers. *Ibid.* The court found that interpretation unpersuasive, ruling that Congress had indicated that "'decency' and 'respect' for diverse beliefs are factors to be considered in determining 'artistic merit,'" *id.* at 75a, and that those factors must receive explicit consideration, *id.* at 76a.

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[2] The district court rejected the government's argument that respondents lacked standing to bring this suit. Pet. App. 70a-74a. The court stated that two of the individual respondents (Hughes and Miller) satisfied Article III standing requirements because they had received NEA grants at the time of the suit and they claimed that Section 5(d)(1) had restricted their expressive conduct. The court held that the artists' association, which included NEA applicants and grant recipients among its members, also had standing. Pet. App. 72a-74a.

Turning to the constitutional arguments, the district court first ruled that Section 5(d)(1) violates the Due Process Clause of the Fifth Amendment because the requirement that the Chairperson take into account "general standards of decency" is impermissibly vague. Pet. App. 76a-78a. According to the court, "the decency provision fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion." *Id.* at 78a. The court also concluded that Section 5(d)(1) violates the First Amendment. *Id.* at 88a. The court reasoned that "government funding of the arts is subject to the constraints of the First Amendment," *id.* at 87a, that Section 5(d)(1)'s "decency and respect" provision "clearly reaches a substantial amount of protected speech," *id.* at 88a, and that Section 5(d)(1) therefore "violates the First Amendment for overbreadth and cannot be given effect," *ibid.*

4. The government appealed the district court's grant of partial summary judgment on respondents' claims that Section 5(d)(1), on its face, violates the First Amendment and the Due Process Clause. A divided court of appeals affirmed "essentially for the reasons stated by the district court." Pet. App. 3a. Like the district court, the court of appeals rejected the government's construction of Section 5(d)(1). *Id.* at 7a-17a. The court of appeals concluded that Section 5(d)(1) requires the Chairperson, National Council, and panels to

> examine each grant application to determine if it comports with "general standards of decency" and shows "respect for diverse beliefs and values" as they subjectively understand these terms.

Id. at 17a. Based on that construction, the court ruled that Section 5(d)(1) is unconstitutional. *Id.* at 15a-27a.

The court of appeals concluded that Section 5(d)(1) is void for vagueness under the First Amendment and the Due Process Clause of the Fifth Amendment. Pet. App. 15a-19a. It ruled, primarily on the basis of this Court's decision in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which rejected a vagueness challenge to a noise ordinance, that grant limitations are subject to vagueness principles. Pet. App. 15a. The court of appeals then concluded that the phrase "decency and respect for the diverse beliefs and values of the American public" is "inherently ambiguous" and "impossible to define." *Id.* at 17a-18a. The court stated:

> Since it is not susceptible to objective definition, the "decency and respect" standard gives rise to the danger of arbitrary and discriminatory application. It grants government officials power to deny an application for funding if the application offends the officials' subjective beliefs and values. Inevitably, NEA's decision not to fund a particular artist or project as indecent or disrespectful will depend in part on who is judging the application and whether that official agrees with the artist's point of view.

Id. at 18a-19a (footnote omitted). The court concluded that, "[w]here First Amendment liberties are at stake, such a grant of authority violates fundamental principles of due process." *Id.* at 19a.[3]

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[3] The court saw no similar problem with applying Section 5(d)(1)'s "artistic excellence" and "artistic merit" criteria, reasoning that the relevant "decision makers possess an expertise

The court of appeals recognized that its holding that Section 5(d)(1) "is unconstitutionally vague effectively disposes of this case." Pet. App. 20a. The court nevertheless stated that "the First Amendment's prohibition on content- and viewpoint-based restrictions provides an alternate ground for [its] decision." *Ibid.* (footnote omitted). The court of appeals rested its analysis in that respect on the premise that the government may not impose content-based restrictions on protected speech unless the government demonstrates that the restrictions advance a compelling interest and are narrowly tailored to serve that interest. *Ibid.*

The court of appeals stated that the "presence of government funding alters this framework somewhat," because "[t]he government may make content-based choices 'when it is the speaker or when its enlists private entities to convey its own message.'" Pet. App. 21a, quoting *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2518 (1995). The court noted that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." Pet. App. 21a, quoting *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991). The court nevertheless concluded that "[g]overnment funding does not invariably justify government control of the content of speech." *Ibid.*

The court of appeals stated that "*Rust* and *Rosenberger* identify two related contexts in which the government may subsidize speech only if it does so in

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in determining 'artistic excellence and artistic merit' that will guide their application of those criteria." Pet. App. 19a n.18.

a way that is viewpoint-neutral." Pet. App. 22a. According to that court,

> Neutrality may be required because the area is a "traditional sphere of free expression," *Rust*, 500 U.S. at 200, or because the government has declared its intention to "encourage a diversity of views from private speakers." *Rosenberger*, * * * 115 S. Ct. at 2519.

Id. at 22a. The court of appeals concluded that "[b]oth approaches support the district court's conclusion that government funding of the arts, in the circumstances of this case, must be viewpoint-neutral." *Ibid.*

The court of appeals reasoned that "the arts, no less than a university, are 'at the core of a democratic society's cultural and political vitality,'" and that "the NEA's purpose is to support a diverse array of artistic expression." Pet. App. 22a. The court further concluded that Section 5(d)(1)'s "decency and respect" provision imposes impermissible viewpoint discrimination on grant applicants. *Id.* at 26a. The court of appeals ruled that, "[b]ecause the government has made no attempt to articulate a compelling interest served by the provision, [Section 5(d)(1)] cannot survive strict scrutiny." *Ibid.* (footnotes omitted).

Judge Kleinfeld dissented. Pet. App. 27a-47a. He recognized that "[a]rtists, and for that matter, non-artists, are constitutionally entitled to express themselves indecently and disrespectfully towards the beliefs and values of as much of the American public as they like." *Id.* at 28a. He concluded, however, that while the First Amendment prohibits censorship of indecent expression, it does not require the government to fund such speech. *Id.* at 29a.

Judge Kleinfeld stated that when the government administers a grant program for the arts, its power to "consider content and viewpoint depends on whether the money it gives out is generally available to all who meet some basic standard, or whether it is a prize given to a select few." Pet. App. 29a. In his view, when the government awards artistic grants on a selective basis, it must inevitably draw distinctions among the applicants based on the government's objectives in providing the financial subsidy. See *id.* at 29a-36a. Hence, it may properly discriminate "by content and viewpoint." *Id.* at 36a. He accordingly rejected the majority's conclusion that Section 5(d)(1) results in impermissible viewpoint regulation.

Judge Kleinfeld also rejected the majority's conclusion that Section 5(d)(1) is void for vagueness. Pet. App. 38a-41a. He acknowledged that Section 5(d)(1)'s "decency and respect" provision is imprecise, but he noted that the criteria for awarding prizes for artistic achievement—such as "artistic excellence and artistic merit"—are inevitably imprecise. *Id.* at 38a-40a. He concluded that, in any event, constitutional vagueness principles, which apply to direct regulation of speech, do not apply to grants awarded on selective criteria. *Id.* at 40a-41a. "An artist applying for an NEA grant has no formula, and is not entitled to one, for the painting or performance which will produce a grant." *Id.* at 41a.

Furthermore, Judge Kleinfeld stated that "the majority has found prohibitions in the statute which are not there." Pet. App. 41a. He noted that Section 5(d)(1), which reflects Congress's desire to exercise greater control over the NEA's expenditures of taxpayer money, does not prohibit the NEA from providing grants to support indecent or offensive art.

Instead, Section 5(d)(1) merely requires that the NEA ensure that "general standards of decency and respect for the diverse values and beliefs of the American public" are "tak[en] into consideration" as relevant factors in the grant selection process. *Id.* at 41a-43a.

5. The government filed a petition for rehearing and a suggestion of rehearing en banc. The court of appeals denied the petition and suggestion. Pet. App. 90a-91a. Judge O'Scannlain dissented in an opinion in which Judges Kozinski and Kleinfeld joined. *Id.* at 92a-95a. The dissenting judges concluded that the panel's decision gives the NEA statute "an implausible construction," *id.* at 92a, applies "the 'void for vagueness' doctrine where it does not belong," *id.* at 93a, and extends "standard First Amendment principles to a situation that the First Amendment doesn't cover," *id.* at 95a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that Section 5(d)(1) of the National Foundation for the Arts and Humanities Act is unconstitutional on its face under the First Amendment and the Due Process Clause of the Fifth Amendment. That court's decision, which renders a provision of an Act of Congress void in all its applications, is incorrect. The consequences are important. The court of appeals' ruling prevents Congress from making a legitimate legislative choice respecting the expenditure of public funds, a matter over which Congress has broad power. This Court is the final arbiter of the question whether Congress has transgressed constitutional limitations. In the face of the court of appeals' ruling, the Court should determine

whether Section 5(d)(1) violates the First and Fifth Amendments.

1. The court of appeals' decision is flawed for three basic reasons. First, the court gave Section 5(d)(1) an "implausible construction" that does not accurately describe the role of Section 5(d)(1) in the NEA's process for awarding grants. Pet. App. 92a (O'Scannlain, J., dissenting from the denial of rehearing). Second, the court of appeals misapplied this Court's decisions in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), and *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995), to the NEA's grant program, which selectively awards financial aid to qualifying applicants on the basis of legislatively prescribed aesthetic criteria. Third, the court mistakenly applied the "void for vagueness" doctrine to the NEA program, which does not implicate the concerns that underlie that doctrine.

a. The court of appeals erred in holding that Section 5(d)(1) of the NFAH Act requires that "the Chairperson, Council, and advisory panels must examine each grant application to determine if it comports with 'general standards of decency' and shows 'respect for diverse beliefs and values' as they subjectively understand these terms." Pet. App. 17a. The majority's construction is inconsistent with the plain language of Section 5(d)(1), which has a much more limited reach.

Section 5(d), as enacted in 1965, provided that the NEA could provide grants only upon an application

submitted in accordance with NEA regulations and procedures. The 1990 Amendments modified Section 5(d) to additionally provide as follows:

> *In establishing such regulations and procedures*, the Chairperson shall ensure that—
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration* general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. 954(d) (emphasis added). The limits of Section 5(d)(1)'s specific instructions are clear. It directs the Chairperson, in establishing regulations and procedures for judging NEA grant applications, to ensure that: (a) applications are judged on the criteria of artistic excellence and artistic merit; and (b) "general standards of decency and respect for the diverse beliefs and values of the American public" are "tak[en] into consideration."

As Judge O'Scannlain observed, Section 5(d)(1) does not say that "the NEA must use 'decency and respect' as the decisive criterion for awarding grants." Pet. App. 92a. Rather, Section 5(d)(1) directs the Chairperson to ensure that those considerations are included in fashioning the NEA's process for awarding financial aid. The Act, by its terms, gives the Chairperson considerable discretion in determining how to ensure that "decency and respect for diverse beliefs and values" are taken into consideration in the grant awarding process. The court of appeals erred in holding that the NEA could implement Section 5(d)(1) in only one way—by "examin[ing] each grant application to determine if it comports with 'general stan-

dards of decency' and shows 'respect for the diverse beliefs and values,'" Pet. App. 17a, and automatically rejecting each application that does not. The Chairperson has reasonably construed Section 5(b)(1), which merely provides for those factors to be "tak[en] into consideration," not to impose such an inflexible mandate.

b. The Constitution does not bar Congress from utilizing asethetic and similar criteria embodying notions of "decency and respect for the diverse beliefs and values of the American public" in awarding grants of public funds to support the arts. The flaws in the court's analysis are most starkly evident if one first examines the court's holding that Section 5(d)(1) violates the First Amendment by imposing impermissible content-based and viewpoint-based restrictions. See Pet. App. 20a-26a.

The court of appeals ruled that Section 5(d)(1) is facially unconstitutional because, it believed, that provision violates a First Amendment principle that government funding of the arts "must be viewpoint-neutral." Pet. App. 22a. We do not agree that Section 5(d)(1) must be understood to impose "viewpoint" restrictions in the sense that term is used in other settings. In the first place, Section 5(d)(1) can be construed to employ "decency and respect for the diverse values and beliefs of the American public" as aesthetic concepts or guideposts. Construed in that way, Section 5(d)(1) addresses essentially the mode or form, rather than the content, of the expressive activity. Cf. *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 683-685 (1986); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 743 n.18 (1978) (opinion of Stevens, J.).

Moreover, even if, for example, "decency" is regarded as addressing the content of a work of art, it

does not necessarily extend to viewpoints on particular subjects. Similarly, "respect for the diverse beliefs and values of the American public" can be understood to refer to the range of subjects that NEA-funded artistic endeavors might embrace and the range of audiences those endeavors might reach, and to embody a resulting recognition that artistic excellence and merit under a program of public funding should be considered in that broader public context.[4] Understood in that way, Section 5(d)(1) does take into account public appreciation and expand the criteria of artistic excellence and merit beyond those that might be utilized in more focused or specialized settings, but without imposing particular viewpoint restrictions.

Nothing in the First Amendment bars Congress from defining the parameters of its program for funding of the arts in that manner. The NFAH Act establishes a federal program in which the NEA selectively awards a limited amount of public funds to grant applicants based on a particularized determina-

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[4] That recognition is also reflected in the Act's declaration of findings and purpose. See NFAH § 2(6), 20 U.S.C. 951(6) ("The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups."); NFAH § 2(9), 20 U.S.C. 951(9) ("Americans should receive in school, background and preparation in the arts and humanities to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression."); NFAH § 2(10), 20 U.S.C. 951(10) ("It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.").

tion of the relative artistic merit of the applicants' proposed undertakings. In determining what projects or programs should receive funding, the NEA must necessarily make funding judgments based on the content of the applicants' proposals. Congress has established statutory criteria to guide the NEA in making those judgments, as Congress necessarily must do to guide the agency's selective determination of which few applications to fund.

The Court made clear in *Rust* v. *Sullivan*, *supra*, that Congress may award grants using criteria that are based on the content of speech without violating the First Amendment:

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. §4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.

500 U.S. at 194. As the Court noted, it has "soundly rejected" the proposition that "if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights." *Ibid.*, citing *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983); *Harris* v. *McRae*, 448 U.S. 297 (1980); and *Maher* v. *Roe*, 432 U.S. 464 (1977).

Under the Court's rationale in *Rust* and the cases on which it relied, Congress may fund the artistic activities that it believes should be encouraged in the broader public interest through the application of aesthetic and related criteria for awarding grants. That is what Congress did here when it directed the Chairperson to ensure in the NEA's regulations and procedures that the NFAH Act funds artistic activities based on "artistic excellence and artistic merit," additionally directing that the Chairperson take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public." NFAH Act § 5(d)(1), 20 U.S.C. 954(d)(1). Those provisions furnish guidance on the types of art that are eligible for federal subsidies. They thereby implement the NFAH Act's declaration of findings and purposes, as amended in 1990, which states:

> Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.

NFAH Act § 2(5), 20 U.S.C. 951(5).

The court of appeals nevertheless concluded that Section 5(d)(1) is unconstitutional in light of the Court's subsequent decision in *Rosenberger* v. *Rector and Visitors of the University of Virginia*, *supra*, which held that the University of Virginia, a public institution, violated the First Amendment by refusing to provide money from its Student Activity Fund to finance a Christian student organization's publication. See 115 S. Ct. at 2520. That decision,

however, addressed a situation that is quite different from the one presented here.

In *Rosenberger*, the University of Virginia provided funding to student organizations for the purpose of creating what was, in essence, a public forum. 115 S. Ct. at 2516-2520. As the Court explained, the University of Virginia had funded the publications of virtually all student organizations that were "related to the educational purpose of the University," *id.* at 2514, including 118 of the 135 groups that had applied for money during the 1990-1991 academic year, *id.* at 2515. The Christian student organization was denied funding solely because its publication adopted the "prohibited perspective" of expressing a belief in a deity. *Id.* at 2515, 2517-2518. In this case, by contrast, Congress has articulated a general standard of artistic excellence and merit that takes into account decency and diverse values and beliefs. It does not single out any "prohibited perspective."

Viewed more broadly, the Court's decision in *Rosenberger* did not repudiate the general principle, articulated in *Rust* and other cases, that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest." *Rust*, 500 U.S. at 193. Rather, *Rosenberger* addressed a particular problem arising from the nature of the particular funding program before it: The University could not simultaneously create a forum "to encourage a diversity of views from private speakers" and at the same time "silence the expression of selected viewpoints" within that forum. 115 S. Ct. at 2519.

In this case, the central purpose of the NFAH Act's grant program is not to create a public forum. Rather, Congress fashioned a highly selective grant-in-aid process, which provides funds to specific

categories of artistic projects, in order to, *inter alia*, "complement, assist, and add to programs for the advancement of * * * the arts by local, State, regional, and private agencies and their organizations," "fulfill [the Federal Government's] educational mission, achieve an orderly continuation of free society," "provide models of excellence to the American people," "transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art." NFAH Act § 2(5) and (11), 20 U.S.C. 951(5) and (11). The 1990 amendments to Section 5(d) set forth general criteria of artistic excellence and merit designed to ensure that the program of public funding for the arts will "serve [those] public purposes the Congress define[d]." NFAH Act § 2(5), 20 U.S.C. 951(5). That action does not transgress the First Amendment.

c. The court of appeals' conclusion that Section 5(d)(1) is unconstitutionally vague is also incorrect. This Court has never held that the "void for vagueness" principles developed in cases involving regulation of speech apply to cases involving congressional funding limitations, and there is no warrant for doing so. Furthermore, even if those principles applied, Section 5(d)(1) is not facially unconstitutional, because the NEA may implement the "decency and respect" provision through regulations and guidance that provide further precision.

The court of appeals reasoned that grant limitations are subject to vagueness principles primarily on the basis of the Court's decision in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which rejected a civil rights demonstrator's argument that a local noise ordinance was void for vagueness. The Court stated

that laws imposing vague proscriptions on expressive conduct may raise constitutional issues because such laws may (1) "trap the innocent by not providing fair warning"; (2) allow "arbitrary and discriminatory enforcement"; and (3) thereby "inhibit the exercise of [First Amendment] freedoms." *Id.* at 108-109. The Court concluded that the noise ordinance was valid because it gave "fair notice," it contained "no broad invitation to subjective or discriminatory enforcement," and it does not "permit punishment for the expression of an unpopular point of view." *Id.* at 112-113.

The court of appeals erred at the outset in transplanting *Grayned*'s vagueness principles governing the regulation of expressive conduct to the NEA grant context. As the Court explained in *Grayned*, a vague law prohibiting expressive conduct can chill speech by leaving uncertain what is prohibited and by allowing arbitrary and discriminatory enforcement. The concern that a vague law may penalize lawful conduct is not present, however, in the context of the NEA grant award process, because Congress's use of imprecise terms in awarding grants does not penalize speech in any meaningful sense. See Pet. App. 93a-94a (O'Scannlain, J., dissenting from denial of rehearing); *id.* at 38a-41a (Kleinfeld, J. dissenting).

The Court's decisions support that conclusion. As noted above, the Court ruled in *Rust* that Congress may selectively fund family planning projects that do not engage in abortion activities. The Court explained that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program," 500 U.S. at 194, and that a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right," *id.*

at 193 (quoting *Regan* v. *Taxation with Representation*, 461 U.S. 540, 549 (1983)). If the government's decision against funding particular speech does not violate the First and Fifth Amendments, then imprecision as to what the government will fund likewise does not infringe First and Fifth Amendment rights. See *Rust*, 500 U.S. at 193 ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."); accord *Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980).

Even if vagueness principles applied in the NEA grant award context, the court of appeals erred in holding that Section 5(d)(1) is facially unconstitutional. Congress has stated the criteria for awarding NEA grants in terms of general standards, such as "artistic excellence" and "artistic merit," to give the NEA a necessary measure of discretion in awarding grants. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989) (Congress may "delegate power under broad general directives."). Despite the imprecision of the terminology, the court of appeals did not conclude that those grant criteria are unconstitutionally vague. See Pet. App. 18a n.18. There is no constitutional impediment to Congress further restricting the grant process to ensure that "general standards of decency and respect for the diverse beliefs and values of the American public" are "tak[en] into consideration" in the grant award process. See *Rust*, 500 U.S. at 195 n.4 ("Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.").

Even when legislation regulates speech, there is no requirement that the legislation provide "mathematical" precision. See *Grayned*, 408 U.S. at 110.

The question is whether the legislation is unconstitutionally vague in the "particular context" in which it is used. *Id.* at 112. Contrary to the court of appeals' reasoning, Section 5(d)(1) is capable of reasonable application in the grant award process. See Pet. App. 40a-43a (Kleinfeld, J., dissenting). Moreover, the NFAH Act authorizes the Chairperson "to prescribe such regulations as the Chairperson deems necessary governing the manner in which the Chairperson's functions shall be carried out." 20 U.S.C. 959(a)(1). Section 5(d)(1) therefore furnishes the Chairperson authority to adopt regulations to implement the "decency and respect" provisions and thereby eliminate any imprecision that might otherwise be present. Hence, there is no warrant for declaring Section 5(d)(1) facially unconstitutional on vagueness grounds without giving the NEA an opportunity to interpret and apply those terms in a specific factual setting.

2. The court of appeals' decision is not only wrong, but it also presents a matter of exceptional importance warranting Supreme Court review. The court of appeals has invalidated an Act of Congress on constitutional grounds. As this Court has repeatedly stated, judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *E.g.*, *Rust*, 500 U.S. at 191; *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981); *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). It is this Court's special province to provide a final resolution of such disputes, especially where, as here, the appellate ruling of unconstitutionality has an impact beyond the geographic boundaries of the circuit

because the parties benefiting from the judgment include an association that has members throughout the Nation.

This case particularly warrants the Court's review because, as Judge O'Scannlain and Judge Kleinfeld independently noted, the court of appeals' decision is in tension with the decisions of two other courts of appeals. See Pet. App. 92a n.1 (O'Scannlain, J., dissenting from rehearing en banc); *id.* at 30a-32a (Kleinfeld, J., dissenting). The First Circuit rejected a First Amendment challenge to a State's denial of an NEA grant based on the judgment of the State's governor and the state arts commission that the work was indecent. *Advocates for the Arts* v. *Thomson*, 532 F.2d 792 (1st Cir.), cert. denied, 429 U.S. 894 (1976). The court of appeals reasoned:

> The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants.

Id. at 795.

The Seventh Circuit rejected a similar First Amendment challenge in *Piarowski* v. *Illinois Community College*, 759 F.2d 625, cert. denied, 474 U.S. 1007 (1985). The court of appeals concluded that the college administration did not violate the First Amendment by instructing the chairperson of the art department to relocate visual art that had generated complaints within the school community.[5] The court

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[5] The art work included depictions of "the naked rump of a brown woman," "a brown woman from the back, standing,

noted that the art was not obscene and "not wholly devoid of artistic merit, or at least artistic intention." *Id.* at 627. The court nevertheless concluded that the college authorities could require relocation of the art, stating:

> The college authorities were worried that [the art work], created by the chairman of the college's art department and exhibited in an alcove off the college's main thoroughfare, would convey an image of the college that would make it harder to recruit students, especially black and female students. If we hold that the college was forbidden to take the action it took to protect its image, we limit the freedom of the academy to manage its affairs as it chooses.

Id. at 629-630. In other words, the college was allowed to take into consideration the type of concerns embraced by Section 5(d)(1)'s provision for taking into account standards of decency and respect for the diverse values and beliefs of the American public.

The court of appeals' decision in this case will have important practical implications because it broadly limits the power of Congress to impose selection criteria on programs that fund expressive conduct. As the dissenting judges stated,

> The majority's opinion does far more than give a hostile construction to a Congressional enactment in order to create a conflict with other circuits and Supreme Court precedent, and overturn a law.

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naked except for stockings, and apparently masturbating," and "a brown woman * * * crouching in a posture of veneration before a robed white male whose most prominent feature is a grotesquely outsized phallus." 759 F.2d at 627.

> It sows the seeds of an imprudent First Amendment jurisprudence which will entangle and choke Congress' ability to control public funds used to sponsor any sort of free expression.

Pet. App. 95a (O'Scannlain, J., dissenting from the denial of rehearing en banc). Review by this Court is accordingly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-56028

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES; TIM MILLER; NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; JANE ALEXANDER,* IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS-APPELLANTS

No. 92-56387

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES; TIM MILLER; NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; JANE ALEXANDER, IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS-APPELLANTS

No. 92-55089

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES; TIM MILLER; NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; JANE ALEXANDER, IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS-APPELLANTS

Argued and Submitted Feb. 3, 1994
Decided Nov. 5, 1996

Before: BROWNING, FERGUSON and KLEINFELD, Circuit Judges.

Opinion by Judge BROWNING; Dissent by Judge KLEINFELD.

JAMES R. BROWNING, Circuit Judge:

Plaintiffs Karen Finley, John Fleck, Holly Hughes, and Tim Miller were refused fellowships under the defendant National Endowment for the Arts' ("NEA") solo performance artists program. They filed suit, alleging, among other things, that a provision of the NEA's governing statute identifying the standard for approval of funding applications violated the Fifth and First Amendments because it was impermissibly vague and imposed content-based restrictions on protected speech. The district court agreed, granted summary judgment to the plaintiffs, and certified

its ruling for interlocutory appeal. *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457 (C.D. Cal. 1992). We affirm, essentially for the reasons stated by the district court.[1]

Congress gave the NEA authority "to establish and carry out a program of . . . grants-in-aid . . . to . . . individuals of exceptional talent engaged in or concerned with the arts." 20 U.S.C. § 954(c). The Chairperson of the NEA has ultimate authority to approve or disapprove grants. 20 U.S.C. §§ 954(c), 955(f). Before making a decision on a particular grant application, however, the Chairperson must consult and receive the advice of the 26-member National Council on the Arts.[2] 20 U.S.C. § 955(f). The Chairperson may not approve any application disapproved by the National Council. *Id.* The Chairperson must

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[1] We do not address the district court's ruling in favor of plaintiffs on their claim that the Chairperson violated the NEA's governing statute by obtaining the advice of the National Council on the Arts through a telephone poll before acting on plaintiffs' applications. The parties have settled this issue.

We also do not reach plaintiffs' claim that the statute imposes an unconstitutional condition in violation of *F.C.C. v. League of Women Voters*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984). The district court denied summary judgment on the ground that there were disputed issues of fact bearing on the claim, and this denial of summary judgment is not appealable. Because the issue is not properly before us, we do not address the dissent's suggestion that *League of Women Voters* is distinguishable.

[2] The Chairperson and Council members are appointed by the President, by and with the advice and consent of the Senate. 20 U.S.C. §§ 954(b)(1), 955(b).

also utilize advisory panels to review applications and make recommendations to the National Council. 20 U.S.C. § 959(c).

An advisory panel recommended approval of plaintiffs' applications; a majority of the Council recommended disapproval; the Chairperson denied the applications. The district court concluded the statutory standard under which the applications were judged, which requires the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public," 20 U.S.C. § 954(d)(1), violated plaintiffs' due process and free speech rights.[3]

I.

The void-for-vagueness doctrine incorporates several important due process principles.[4] It requires

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[3] 20 U.S.C. § 954(d), as amended in 1990, reads as follows:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.* . . . (added language emphasized).

[4] Although the dissent argues the applicants have no property right in NEA grants and their liberty to express themselves is not regulated by the grants, the right to engage in free speech is a liberty interest protected by due process. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 418, 94 S.Ct. 1800, 1814, 40 L.Ed.2d 224 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir. 1983) ("Freedom of speech is one of the liberties the due process clause has been held to protect."). Art is one of many protected forms of speech. *See Miller v. California*, 413 U.S. 15, 34, 93 S.Ct. 2607, 2620, 37 L.Ed.2d 419 (1973). While the artists do not have a property right in the grants, they are protected by the due process clause from arbitrary and discriminatory enforcement of vague standards that "'abut[s] upon sensitive areas of basic First Amendment freedoms.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972) (citation omitted).

that a law give fair notice of its mandate. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972).

The First Amendment, moreover, is an independent source of vagueness doctrine. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33, 83 S.Ct. 328, 337-38, 9 L.Ed.2d 405 (1963); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1266 (3d Cir. 1992) (explaining that "courts have transplanted this due process principle into the First Amendment setting"). Thus, we routinely consider whether speech-related statutes are impermissibly vague without specifying the liberty or property interest at stake. *See Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512-14 (9th Cir.1988); *Planned Parenthood v. Arizona*, 718 F.2d 938, 946-49 (9th Cir.1983). In this case, we ground our discussion of vagueness in both the Fifth and First Amendments.

In addition, we disagree with the dissent's suggestion that First Amendment vagueness doctrine only applies if the government regulates speech or places conditions on a generally available benefit. As the Court noted in *Rosenberger*, the scarcity of a government benefit does not render it immune from constitutional limitations. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, — U.S. ——, —— - ——, 115 S.Ct. 2510, 2519-20, 132 L.Ed.2d 700 (1995).

The void-for-vagueness doctrine also requires that a law provide explicit standards for those who are to apply it. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09, 92 S.Ct. at 2299.

The twin dangers of a vague law—lack of notice and arbitrary or discriminatory application—may chill the exercise of important constitutional rights. "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" *Id.* at 109, 92 S.Ct. at 2299 (citation omitted). Not surprisingly, therefore, courts apply a heightened vagueness standard to a law that could deter protected speech because of its uncertain meaning. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33, 83 S.Ct. 328, 337-38, 9 L.Ed.2d 405 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").[5]

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[5] NEA contends that on review of a facial challenge, plaintiffs may prevail only if "there are no constitutional ways that the statute can be implemented." This standard applies only if the statute "implicates no constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982); *United States v. Wunsch (In re Swan)*, 84 F.3d 1110, 1119 (9th Cir.1996). When a law implicates free speech, a "more stringent vagueness test" should apply. *Hoffman*, 455 U.S. at 499, 102 S.Ct. at 1193; *see also Wunsch*, 84 F.3d at 1119.

A.

NEA's primary contention is that the vagueness of the "decency and respect" provision is not an issue. In its view, Congress did not compel NEA to add this element to the standard for judging grant applications, and the NEA elected not to add it. The standard therefore remains as it was before the amendment: the sole criteria for judging grant applications are "artistic excellence and artistic merit."

NEA reads the "decency and respect" amendment as requiring only that the Chairperson "*tak[e] into consideration* general standards of decency and respect for diverse beliefs and values" when promulgating regulations and procedures for judging grant applications. 20 U.S.C. § 954(d)(1) (emphasis added). According to NEA, the Chairperson *did* address Congress's concern that decency and respect for diverse beliefs and values be considered in funding decisions, and concluded no change in the regulations was necessary because the NEA's governing statute requires advisory panels with diversified membership to review applications and make recommendations to the National Council.[6] The Chairperson reasoned that because advisory panels were composed of members chosen to reflect a wide range of backgrounds and points of view, the decisions of these panels as to the artistic excellence and merit of individual applications would necessarily reflect general standards of

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[6] The statute requires the Chairperson to: "issue regulations and establish procedures . . . to ensure that all panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view. . . ." 20 U.S.C. § 959(c).

decency and show respect for the diverse beliefs and values of the American public.

This interpretation reads § 954(d) as if it had not been amended. Congress added the clause at issue—"taking into consideration general standards of decency and respect"—immediately after the clause specifying the criteria by which applications are to be judged—"artistic excellence and artistic merit." Read together, these clauses instruct the Chairperson to ensure that standards of decency and respect for diverse values are considered when judging the artistic merit and excellence of an application.

Congress spoke in mandatory terms when it amended the criteria for judging grant applications: "the Chairperson *shall ensure* that ... artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d) (emphasis added). This language does not grant the Chairperson broad discretion in establishing criteria for judging grant applications, as NEA contends; it actually restricts the Chairperson's discretion by requiring him or her to judge applications according to standards of "decency and respect."[7]

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[7] The dissent suggests this provision merely requires the NEA to think about standards of decency and respect rather than to act according to what thoughts of "decency and respect" might dictate. This suggestion is implausible on its face and belied by the record. During the period in which the plaintiffs' applications were being considered, Chairperson Frohnmayer told his staff that the NEA had to live in a "political world" and reject some grant applications to

NEA's reading of § 954(d)(1) is also contrary to traditional canons of statutory construction. If § 954(d)(1) required nothing more than diverse advisory panels, the "decency and respect" provision would be redundant in view of § 959(c), also adopted as part of the 1990 amendments, which expressly requires that advisory panels reflect diversity.[8] *See Freytag v. Commissioner*, 501 U.S. 868, 877, 111 S.Ct. 2631, 2638, 115 L.Ed.2d 764 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'") (citation omitted).[9]

And turning to the legislative history, as we do to interpret an ambiguously worded statute, makes it clear that Congress intended to change the standard NEA applied in judging applications for funding, not simply to ask the NEA to consider the problem. NEA had been attacked for funding controversial artists and art works. Criticism had focused on a series of photographs by Robert Mapplethorpe objected to as homoerotic images, and on a photograph by Andres Serrano criticized as blasphemous. The "decency and respect" provision was enacted in direct response to this controversy and was specifically designed to prevent the funding of similar art works. Members of

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"reassure [the NEA's] constituency." (Supplemental Excerpts of Record 148).

[8] *See supra* note 6.

[9] NEA's argument that its interpretation of § 954(d)(1) does not render the "decency and respect" provision redundant because under NEA's interpretation the Chairman was not compelled to make any change in the standard at all, necessarily fails with our rejection of NEA's interpretation of § 954(d)(1).

Congress noted that the "decency and respect" provision would prevent the funding of similar works in the future.[10] 136 Cong. Rec. H9410-57 (Oct. 11, 1990).

In the words of Representative Henry, author of the provision: "[T]his substitute includes language in the heart of the grant making ... process. We add to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account on behalf o[f] the American public. . . ." 136 Cong. Rec. H9417 (Oct. 11. 1990). Representative Henry described the provision as "new language now in the grant procedure itself which mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded." 136 Cong. Rec. H9457 (Oct. 11, 1990). In the same vein, Representative Coleman, co-sponsor of the bill, said: "[W]e have added language . . . which underscores that the decisions of artistic excellence must take into consideration general standards of decency and respect for the diverse beliefs and values of the American public. Works which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." 136 Cong. Rec. H9410 (Oct. 11, 1990).

In concluding that Congress intended to include the criteria of "decency and respect" in the standard for judging grant applications, we reject NEA's contention that § 954(d)(1) is to be read as a compromise between legislators who wanted to impose explicit content restrictions upon funding and those who wanted to impose no "decency and respect" restric-

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[10] Mapplethorpe's and Serrano's works were also referred to during debates on NEA's budget. See, *e.g.*, 135 Cong. Rec. H3637, H3640 (July 12, 1989).

tion at all, and agreed simply to identify "decency and respect" as an area of concern but require no further action by NEA. No proposal submitted to Congress would have permitted funding with no content restriction at all. The dispute was not over whether NEA should be free to fund indecent or disrespectful art, but over the way in which the new limitation would be imposed: whether Congress should specify categories of art that could not be funded or instruct NEA to consider general standards of "decency and respect" in judging the artistic merit of a grant application. Congress settled on the latter approach.

We also reject NEA's argument that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), requires deference to NEA's construction of its statutory mandate. NEA's construction of the statute as permitting the Chairperson to rely upon greater diversity in advisory panel membership in lieu of a change in the criteria for judging grant applications is not a "permissible" or "reasonable" one to which deference is required. *Id.* at 843-45, 104 S.Ct. at 2782-83. Moreover, NEA itself did not in practice adopt the interpretation of the "decency and respect" provision it advocates in this litigation. In a meeting held on December 14 and 15, 1990, the Chairperson and National Council considered a number of proposals to implement the "decency and respect" provision. They did not question their obligation under § 954(d)(1) to judge grant applications according to "general standards of decency and respect for the diverse beliefs and values of the American public." Instead, to satisfy this new obligation, NEA officials adopted the approach of having the Chairperson instruct advisory panel members to bring their own

definitions of these terms "to the table" and make them "part of the deliberative process." Minutes of the December 1990 Retreat of the National Council on the Arts at 21, S.E.R. at 23.

B.

NEA contends that even if § 954(d)(1) requires it to judge grant applications according to general standards of decency and respect, the Chairperson could by regulation implement this standard in a way that would obviate the vagueness problem. However, the NEA has failed to present a narrowing construction that is consistent with the language and purpose of the statute, and "we will not rewrite a . . . law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n.*, 484 U.S. 383, 397, 108 S.Ct. 636, 645, 98 L.Ed.2d 782 (1988); *see also Heckler v. Mathews*, 465 U.S. 728, 741, 104 S.Ct. 1387, 1396, 79 L.Ed.2d 646 (1984) ("The canon favoring constructions of statutes to avoid constitutional questions does not . . . license a court to usurp the policymaking and legislative functions of duly elected representatives.").

NEA suggests the Chairperson could apply § 954(d)(1) by rejecting applications for funding of projects that are obscene under the standard announced in *Miller v. California*, 413 U.S. 15, 24-25, 93 S.Ct. 2607, 2614- 16, 37 L.Ed.2d 419 (1973)—a standard that passed the vagueness test in *Hamling v. United States*, 418 U.S. 87, 110-16, 94 S.Ct. 2887, 2904-07, 41 L.Ed.2d 590 (1974). However, the proposed construction would render redundant a separate prohibition against funding projects determined to be obscene, subsection (2)

of section 954(d).[11] *See Freytag*, 501 U.S. at 877, 111 S.Ct. at 2638. Congress adopted the "decency and respect" provision because it was broader and had a different meaning than the provision prohibiting the funding of obscene art.[12] Moreover, the NEA's proposed construction would be contrary to the express intent of Congress that determinations of obscenity be made by the courts and not by NEA.[13]

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[11] 20 U.S.C. § 954(d)(2) reads:

> Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment for the Arts.

NEA argues the suggested regulation would not render section 954(d)(2) redundant because the latter applies only to material "determined to be obscene" by a court. This argument does not affect the other reasons stated in the text for the invalidity of the hypothetical regulation.

[12] *See* 136 Cong. Rec. H9457 (Oct. 11, 1990) (Statement of Rep. Henry) ("[The decency and respect provision] is much broader than all the obscenity language which we have been debating about. . . . [G]iven the Miller versus California standard, anything that has artistic merit is not by legal definition obscene. So, how can we seek to address the problem that we heard from our constituents? We put general decency requirements into the act.").

[13] "The term 'determined to be obscene' means determined, in a final judgment of a court of record and of competent jurisdiction in the United States, to be obscene." 20 U.S.C. § 952(j). *See* 136 Cong. Rec. H9676 (Oct. 15, 1990) (statement of Rep. Weiss) ("Is not one of the problems also that whereas the Williams/Coleman [amendment] provides for the obscenity determination to be made by the courts, in the Regula amendment the determination would have to be made by NEA and

NEA also seems to suggest the Chairperson might avoid the vagueness problem by adopting the definition of "indecent communication" promulgated by the Federal Communication Commission and applying the standard only to works intended for children.[14] This construction is precluded by Congress's explicit refusal to include the FCC's definition of indecency in s 954(d)(1).[15] Congress considered the definition inappropriate for the arts, even if appropriate for broad-

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that in itself would be unconstitutional, an abrogation of first amendment rights."); 136 Cong. Rec. H9411 (Oct. 11, 1990) (statement of Rep. Richardson) ("The legislation that we have in front of us says very clearly that the NEA may not fund obscenity and the determination of obscenity is left to the courts not politicians, not bureaucrats. But the courts, among juries of average people.").

[14] The NEA refers to a 1989 statute that prohibits any person from knowingly using the telephone to make "any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent. . . ." 47 U.S.C. § 223(b)(2)(A). The FCC defined "indecent communication" as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary standards for the telephone medium." *Information Providers' Coalition v. F.C.C.*, 928 F.2d 866, 874 (9th Cir. 1991) (holding regulation is not unconstitutionally vague).

[15] When Congress enacted the "decency and respect" provision, it rejected a rival amendment, the Regula amendment. The Regula amendment would have required the NEA to judge grant applications according to the decency standard articulated in *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 731-32, 98 S.Ct. 3026, 3030-31, 57 L.Ed.2d 1073 (1978)—the same standard adopted by the FCC in the "dial-a-porn" context. *See Information Providers' Coalition*, 928 F.2d at 874 (noting that the FCC's definition of "indecent communication" was lifted from the broadcast regulation at issue in *Pacifica*).

casting.[16] Moreover, unlike the statute implemented by the FCC's regulation, § 954(d)(1) is not aimed solely at indecent speech harmful to minors, but requires the NEA to judge *all* grant applications according to both "general standards of decency *and* respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1) (emphasis added). Nothing in § 954(d)(1) or its legislative history suggests the NEA may choose to apply the "decency and respect" provision to some funding applications and not to others or that it may ignore the "respect" criterion when it does apply the provision.

C.

NEA and the dissent argue the "decency and respect" provision is not subject to a vagueness challenge because it does not regulate conduct directly but merely subsidizes speech. Although the need for fair warning may be less when a statute does not directly regulate conduct, the need for specific standards to prevent arbitrary and discriminatory application of provisions that touch upon speech may be even greater when a statute subsidizes speech and the risk that the provision on its face will inhibit speech remains. *See Grayned*, 408 U.S. at 108, 92 S.Ct. at 2298; *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 514 (9th Cir.1988) (holding void for vagueness a regulatory provision exempting from import duties certain

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[16] 136 Cong. Rec. H9680 (Oct. 15, 1990) (statement of Rep. Coleman) ("[T]he Regula amendment is in fact imposing a standard created by the Supreme Court to protect children listening to the radio, and he is applying it to everyone, including adults, by his amendment. . . . Coming out over the airwaves is one thing. Going to a theater performance is another.").

types of written materials); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1039 (D.C. Cir. 1980) (holding void for vagueness a tax exemption for educational and charitable organizations).[17]

NEA also argues that the decency provision is not subject to a vagueness challenge because it merely directs the Chairperson to promulgate regulations and establish procedures to govern applications for funding; such regulations and procedures may be subject to the void-for-vagueness test, but the direction to the Chairperson to establish them is not. This argument rests on the interpretation of § 954(d)(1) rejected earlier. Section 954(d)(1) is not a broad grant of regulatory authority which the Chairperson may implement in a discretionary manner, but a directive to the NEA to judge grant applications according to standards of "decency and respect."

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[17] Our conclusion is not affected by *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) and *Regan v. Taxation with Representation*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). Neither case involved a vagueness challenge. Moreover, in *Bullfrog Films* we held a duty exemption void for vagueness while recognizing the general principles announced in Regan. And, as we discuss more fully in Part II, Rust is of limited applicability in light of the reasoning of *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, — U.S. ——, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), differentiating government programs that encourage private speech from government programs that use private speakers "to transmit specific information pertaining to [government] program[s]." *Id.* at ——, 115 S.Ct. at 2519. The NEA is a quintessential example of a government program designed to encourage private speech, rather than one that seeks to use private individuals for a particular government purpose, such as the dissent's example of commissioning an artist to create a bust of Lincoln for display in a public building.

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The "decency and respect" provision was enacted to prevent the funding of particular types of art. To that end, it places a mandatory duty on the Chairperson to ensure that grant applications are judged according to "general standards of decency and respect for the diverse beliefs and values of the American public." The Chairperson has no discretion to ignore this obligation, enforce only part of it, or give it a cramped construction. Rather, the Chairperson, Council, and advisory panels must examine each grant application to determine if it comports with "general standards of decency" and shows "respect for diverse beliefs and values" as they subjectively understand these terms. The record indicates this is exactly how the Chairperson and Council interpreted the provision prior to this litigation.

So construed, the "decency and respect" provision violates due process because "no standard of conduct is specified at all," *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971), and the statute thus provides no "ascertainable standard for inclusion and exclusion." *Smith v. Goguen*, 415 U.S. 566, 578, 94 S.Ct. 1242, 1249, 39 L.Ed.2d 605 (1974). Without doubt, persons "of common intelligence must necessarily guess at [the] meaning and differ as to [the] application" of the terms "decency" and "respect." *See Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). These terms are inherently ambiguous, varying in meaning from individual to individual. *See Smith*, 415 U.S. at 573, 94 S.Ct. at 1247 ("[W]hat is contemptuous to one . . . may be a work of art to another."); *Coates*, 402 U.S. at 614, 91

S.Ct. at 1688 ("Conduct that annoys some people does not annoy others."); *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971) ("[O]ne['s] vulgarity is another's lyric."). The content of the term "diverse beliefs and values of the American public" is also impossible to define. The individual members of a pluralistic society, and particularly our own, have a great variety of beliefs and values, largely unascertainable. *See Bullfrog Films*, 847 F.2d at 513.

Since it is not susceptible to objective definition, the "decency and respect" standard gives rise to the danger of arbitrary and discriminatory application.[18]

[18] The dissent suggests that it is untenable to find the "decency" and "respect" criteria impermissibly vague without also holding unconstitutional the statute's provision that "artistic excellence and artistic merit are the criteria by which applications are judged." 20 U.S.C. § 954(d)(1). The short answer is that appellants have challenged only the "decency" and "respect" criteria, and therefore only these criteria are before us. The application of the "void for vagueness" doctrine to the criteria of "artistic excellence and artistic merit" may present quite different considerations.

One obvious difference may be the extent to which the two sets of criteria implicate the policy concerns underlying the "void for vagueness" doctrine. *See* generally *Bullfrog Films*, 847 F.2d at 512 (vague laws are objectionable because they "trap the innocent by not providing fair warning," invite arbitrary and discriminatory enforcement, and discourage the exercise of constitutional rights). A second difference that may affect the outcome is the context in which the criteria are applied and the characteristics of the decision makers. Funding applications are reviewed by advisory panels composed of artists and "lay individuals who are knowledgeable about the arts." 20 U.S.C. § 959(c)(2). Recommendations of the advisory panels are reviewed by the National Council of the Arts, which is composed of persons to be selected "from among the private citizens of the United States who (A) are widely recognized for

It grants government officials power to deny an application for funding if the application offends the officials' subjective beliefs and values. Inevitably, NEA's decision not to fund a particular artist or project as indecent or disrespectful will depend in part on who is judging the application and whether that official agrees with the artist's point of view. Under such a grant of authority, funding may be refused because of the artist's political or social message or because the art or the artist is too controversial. This danger is especially pronounced because a vague statute effectively shields decisions from review. Where First Amendment liberties are at stake, such a grant of authority violates fundamental principles of due process.

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their broad knowledge of, or expertise in, or for their profound interest in, the arts and (B) have established records of distinguished service, or achieved eminence, in the arts." 20 U.S.C. § 955(b).

Such decision makers possess an expertise in determining "artistic excellence and artistic merit" that will guide their application of these criteria; they have no corresponding expertise in applying such free-floating concepts as "decency" and "respect." As then-NEA Chairperson Frank Hodsoll testified, "I don't see any way for a Federal panel . . . expert in the arts, not expert in community standards . . . to make determinations for the entire Nation as to what is acceptable or what is not going to be patently offensive." *Reauthorization of Foundation on the Arts and the Humanities Act of 1965, Joint Hearings Before the Subcomm. on Select Education & the Subcomm. on Post-secondary Education of the Comm. on Education and Labor*, 99th Cong., 1st Sess. 552 (1985).

II.

Our holding that § 954(d)(1) is unconstitutionally vague effectively disposes of this case. However, in view of the dissent's argument that the government may restrict the content of speech it funds, we briefly explain why the First Amendment's[19] prohibition on content- and viewpoint-based restrictions provides an alternate ground for our decision.

"It is axiomatic" that under the First Amendment, "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2516; *see also Action for Children's Television v. F.C.C.*, 58 F.3d 654, 659 (D.C. Cir. 1995). A content-based restriction on speech is therefore presumed unconstitutional, *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2516, and must be subjected to " 'the most exacting scrutiny.'" *Texas v. Johnson*, 491 U.S. 397, 412, 109 S.Ct. 2533, 2544, 105 L.Ed.2d 342 (1989) (quoting *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988)). To survive this scrutiny, the government must advance a compelling interest served by its regulation of the content of protected speech, and the regulation must be narrowly tailored to serve that interest. *Sable Communications v. F.C.C.*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989); *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, ___ U.S. ____, ____, 116 S.Ct. 2374, 2385, 135 L.Ed.2d 888 (1996) (government

[19] Art is protected by the First Amendment. As the Supreme Court noted in *Miller v. California*, "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value." 413 U.S. at 34, 93 S.Ct. at 2620.

may directly regulate speech "to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech"); *Action for Children's Television*, 58 F.3d at 659.

The presence of government funding alters this framework somewhat. The government may make content-based choices "when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2518. Thus, the Supreme Court has upheld regulations that granted tax deductions for veterans' groups but not for other charitable groups engaged in lobbying, *see Regan v. Taxation With Representation*, 461 U.S. 540, 545-48, 103 S.Ct. 1997, 2000-02, 76 L.Ed.2d 129 (1983), and barred recipients of federal family planning funds from providing information on abortion. *Rust v. Sullivan*, 500 U.S. 173, 200, 111 S.Ct. 1759, 1776, 114 L.Ed.2d 233 (1991). As the Court explained in *Rust*, "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194, 111 S.Ct. at 1773.

Government funding does not invariably justify government control of the content of speech, however. In *Rust*, the Court cautioned that its holding would not apply to public fora or to universities, which occupied "a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted." *Rust*, 500 U.S. at 200, 111 S.Ct. at 1776.

In addition, *Rust* and *Rosenberger* identify two related contexts in which the government may subsidize speech only if it does so in a way that is viewpoint-neutral. Neutrality may be required because the area is a "traditional sphere of free expression," *Rust*, 500 U.S. at 200, or because the government has declared its intention to "encourage a diversity of views from private speakers." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2519. Both approaches support the district court's conclusion that government funding of the arts, in the circumstances of this case, must be viewpoint- neutral.

As the district court explained, the arts, no less than the university, are "at the core of a democratic society's cultural and political vitality," *Finley*, 795 F. Supp. at 1473. The district court's analysis is full and cogent, and we need not repeat it here.[20] Similarly, Congress has clearly indicated the NEA's purpose is to support a diverse array of artistic expression. Even the most cursory review of the NEA's enabling statute reveals this intent. In its findings, Congress emphasized that a democracy must "honor and preserve its multi-cultural artistic heritage as well as support new ideas" and declared its intent "to help create and sustain ... a climate encouraging freedom of thought, imagination, and

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[20] NEA contends the district court erred by extending *Rust* to the arts funding context, arguing the *Rust* exceptions are limited to "special places" and "special relationships." This argument is foreclosed by *Rosenberger*, which took a much broader view of the First Amendment's applicability to subsidized speech. *See Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2517 (university's student activities fund, while not a traditional physical forum, was subject to First Amendment constraints).

inquiry." 20 U.S.C. § 951(10), (7). The Senate Report accompanying the legislation emphasized that "freedom of artistic and humanistic expression" was to be given "the fullest attention" and that "[c]onformity for its own sake is not to be encouraged, and ... no undue preference should be given to any particular style or school of thought or expression." *See* S.Rep. No. 300, 89th Cong., 1st Sess. 4 (1965). The House reaffirmed this view in adopting the 1985 amendments to the NEA's governing legislation, urging NEA to be "more responsive to funding programs that represent the many traditions in our heritage and the full cultural diversity of our citizens. . . . [T]he [funded] programs should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free." H.R. Rep. No. 274, 99th Cong., 1st Sess. 13, *reprinted in* 1985 U.S.C.C.A.N. 1055, 1058. The NEA and it programs were created to encourage diverse private speech and not, as the dissent suggests, to engage in "speech for hire."

The First Amendment prohibits the government from "regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2516 (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)); *see Johnson*, 491 U.S. at 414, 109 S.Ct. at 2545 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Even when the government is funding speech, it may not distinguish between speakers on the basis of the speaker's viewpoint or otherwise "ai[m] at the suppression of

dangerous ideas." *Regan*, 461 U.S. at 548, 103 S.Ct. at 2002 (*quoting Cammarano v. United States*, 358 U.S. 498, 513, 79 S.Ct. 524, 533, 3 L.Ed.2d 462 (1959)); *see Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158-59, 66 S.Ct. 456, 462-63, 90 L.Ed. 586 (1946).

Therefore, we cannot agree with NEA's assertion that the "decency and respect" provision does not reflect viewpoint discrimination.[21] In *Rosenberger*, the Supreme Court found viewpoint discrimination in a university regulation that "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." ___ U.S. at ____, 115 S.Ct. at 2517. Central to the court's decision was the fact that under the regulation, *any* topic treated from a religious perspective would be denied funding. *See id.* ("Religion . . . provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments."). Here too, it is the treatment of a subject, not the subject itself, that is disfavored. Two depictions of the same subject matter—an American flag, for example—could be treated differently if NEA believed one depiction symbolized an "indecent" perspective or demonstrated disrespect for "the diverse beliefs and values of the American public," and the other did not.

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[21] NEA and the dissent rely on two cases, *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir. 1976), and *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625 (7th Cir. 1985). Both cases are distinguishable. Moreover, both were decided before *Rosenberger*, and to the extent they conflict with this most recent teaching on viewpoint discrimination, are not persuasive.

The dissent argues we have erred in applying the body of law for regulation of speech and generally available entitlements to prizes. According to the dissent, since the NEA grants are a prize given to a select few, rather than a generally available benefit, the government can choose to support only a certain viewpoint. The Supreme Court explicitly rejected a similar argument by the University in *Rosenberger*. As the Court explained, "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." ___ U.S. at ____, 115 S.Ct. at 2519. Although NEA awarded only 88 grants from an applicant pool of 5,168, it cannot provide those scarce grants to favor a particular viewpoint. See *id.* at ____ - ____, 115 S.Ct. at 2519-20 (rejecting the University's argument that "scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible").

NEA contends the "decency and respect" provision is permissible because it can be implemented in a viewpoint-and content-neutral way.[22] As we have

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[22] On similar grounds, NEA urges us not to reach plaintiffs' First Amendment claims. However, we disagree with NEA's assertion that the district court's First Amendment decision was "obviously premature" because it rested on assumptions about how the Chairperson would implement § 954(d)(1)'s "decency and respect" provision. Under the interpretation originally proposed by NEA, the statute was implemented when the Chairperson, taking "decency and respect" into consideration, decided no changes in the application process were needed. We rejected this interpretation in Part I(A), *supra*, and NEA now argues we should avoid the First Amendment issues because "there is no way to predict what the Chairperson's new manner of implementing the statute would be." Plaintiffs bring a facial challenge, however. Although NEA is entitled to promulgate regulations interpret-

explained, however, § 954(d)(1) on its face requires NEA to take "decency" and "respect" into account in considering grant applications. Like the funding restriction at issue in *Rosenberger*, the "decency and respect" provision clearly focuses on the content of the speech at issue; it "has a speech-based restriction as its sole rationale and operative principle." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2519.

The "decency and respect" provision authorizes viewpoint discrimination, an "egregious form of content discrimination." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2516. Because the government has made no attempt to articulate a compelling interest served by the provision,[23] § 954(d)(1) cannot survive strict scrutiny.[24]

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ing the statute, we are not obligated to withhold judgment while the agency does so.

[23] Amici suggest Congress may have wished to avoid requiring taxpayers to fund work they found offensive. However, neither protecting people from offensive and indecent speech nor protecting the taxpayer from unwanted expenditures is a compelling interest sufficient to justify content-based restrictions on speech. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); *Sable*, 492 U.S. at 126, 109 S.Ct. at 2836 (First Amendment protects speech that is "indecent but not obscene"); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 385 n. 16, 104 S.Ct. 3106, 3120 n. 16, 82 L.Ed.2d 278 (1984) (taxpayers' opposition to expenditure of government funds cannot "be invoked to justify a congressional decision to suppress speech").

[24] The district court concluded § 954(d)(1) was unconstitutionally overbroad because it was a content-based restriction that "swe[pt] within its ambit speech and artistic expression which is protected by the First Amendment." *Finley*, 795 F. Supp. at 1476. Although we frame our discussion in terms of strict scrutiny, we agree with the district court's conclusion.

III.

The "decency and respect" provision of § 954(d)(1) is void for vagueness under the Fifth Amendment, and impermissibly restricts plaintiffs' First Amendment rights as well.

AFFIRMED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

First Amendment law has taken some odd turns lately. We now live in a legal context prohibiting display of a cross or menorah on government property. *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir.1996), *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir.1996). But if a cross is immersed in urine, a government grant cannot be withheld on the ground that the art would offend general standards of decency and respect for the religious beliefs of most Americans. The government, under today's decision, cannot even consider "general standards of decency and respect for the diverse beliefs and values of the American public" when it gives artists grants. Yet we penalize private employers for slowness in firing employees who do not show decency and respect for other employees. *See Steiner v. Showboat Operating Company*, 25 F.3d 1459 (9th Cir. 1994). This self-contradictory silliness is not built into the Bill of Rights. The First Amendment does not prohibit the free exercise of common sense.

Artists, and for that matter, non-artists, are constitutionally entitled to express themselves indecently and disrespectfully toward the beliefs and values of as much of the American public as they like. Indecency sometimes helps to communicate an idea effectively, and it is constitutionally protected. *See Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Lenny Bruce's monologues needed offensive indecency to accomplish their legitimate artistic objective. The same language that gave rise to liability in *Steiner* was essential to Allen Ginsberg's artistic expression in *Howl* and *Kaddish*. The great Modigliani nudes are frankly erotic and focus on the models' pubic hair; our Constitution unquestionably protects them from censorship. Less artistically distinguished attempts to communicate by means of offensiveness and indecency are also entitled to First Amendment protection. Molly Bloom's soliloquy, Aristophanes' jokes about passing gas, Shakespeare's double entendres, the indecent kiss in Chaucer's *Miller's Tale*, and countless works by lesser artists, such as Samuel Clemens' *1601* and Vladimir Nabakov's *Lolita*, are all part of the ancient artistic tradition of using the impolite or indecent in art. Every general art history textbook reproduces and discusses Edouard Manet's *Luncheon On the Grass*, a painting of a nude woman looking at the artist while two fully clothed men sit next to her and talk to each other. The content and viewpoint doubtless offend, but the art history books are constitutionally protected regardless. There can be no constitutional excuse for allowing the government to censor art on grounds of indecency or offensiveness. I hope that it is still as clear as it was when *Cohen* came down that anyone in America, artist or not, has a

constitutional right to express himself indecently and offensively.

That offensive or indecent expression cannot be censored does not mean that the government has to pay for it. By drawing the line between private expression and government conduct, we preserve liberty for individual expression, while preserving democracy for governmental decisions. Any time government enters a previously private sphere of conduct, the line becomes blurred, and the issues difficult. Government subsidy of art was an easy issue when the Medicis hired artists—the Medicis could freely impose their preferences. But when a democratic government pays artists to stick their thumbs in the public's eye, the public naturally becomes annoyed, and attempts to exercise its ordinary authority in a democracy to control through Congress how tax monies are spent.

Whether government can consider content and viewpoint depends on whether the money it gives out is generally available to all who meet some basic standard, or whether it is a prize given to a select few. Only 88 out of 5168 applicants for Visual Artists Fellowships won grants in fiscal year 1994. *1994 Annual Report, National Endowment for the Arts* 10. Applying for an NEA arts grant is not like applying for welfare, social security, a tax exemption, or a student activity grant. NEA grants are prizes for the fortunate few, not entitlements.

The case at bar does not involve government censorship. If Congress had prohibited artists from expressing themselves indecently or disrespectfully, the Constitution would make such a law null and void. The NEA statute before us is not such a law. It does not restrict what artists do. It restricts what the

NEA can do. This case is about whether the American people can require a government agency to consider, in giving grants to very few of the many artists in the country, "general standards of decency and respect for the diverse beliefs and values of the American public."

Our decision today creates a conflict with the only other circuits to have confronted a similar issue. *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir.), *cert. denied*, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976). In *Advocates*, New Hampshire denied an NEA grant to a literary magazine because the governor and state arts commission thought a poem it published was indecent. The First Circuit, rejecting the First Amendment challenge, explained that denial of a grant was not suppression of speech, and the grant selection process necessarily discriminated based on content:

> [P]ublic funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants.

Id. at 795. *Advocates* suggests that every disappointed grant applicant has the same First Amendment right of self-expression, but that does not mean that every disappointed grant applicant has a First

Amendment claim. *Id.* at 795-96. Suppose the NEA arts panel discriminates by viewpoint against an excellent artist whose work is too conventional for the panel's tastes—an artist with the superb technique of a Robert Mapplethorpe and the vision of a Norman Rockwell. And suppose it discriminates against another whose art is too indecent and offensive. And another, whose viewpoint is interesting but whose technique is less than excellent. Do all have First Amendment claims under the majority decision? Only the one who creates indecent art? Only the ones with excellent technique? It is impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression, decent and indecent.

The Seventh Circuit ruled similarly to the First Circuit, in *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir.1985). The chairman of the art department hung his stained glass panels of such subjects as "the naked rump of a brown woman, and sticking out from (or into) it a white cylinder" in the college's gallery near the main entrance to a heavily trafficked building. The college told him to move three panels to a less heavily trafficked fourth floor display space, after receiving "complaints from students, cleaning women, and black clergymen." *Id.* at 628. The main entrance space was especially desirable, but not a public forum, and not available to all. The artist lost his case.

The Seventh Circuit distinguished between what an artist is free to create, and what the government must display.

> If Claes Oldenberg, who created a monumental sculpture in the shape of a baseball bat for display in a public plaza in Chicago, had created instead a giant phallus, the city would not have had to display it next to a heavily trafficked thoroughfare.

Id. at 630.

Advocates points out the resemblance of a government grant program to a government auditorium providing space for artistic performances. If it is a public forum, then neutrality is required by the First Amendment. *Advocates*, 532 F.2d at 796. But if the space is available only to a select few invited exhibitors as in *Piarowski*, then the government, already excluding much constitutionally protected art, need not be neutral toward offensive or indecent art. That is why, in the Piarowski example, Chicago would be free to discriminate in favor of baseball bats and against phalluses in the hypothetical display.

The majority tries to distinguish the First Circuit and Seventh Circuit cases on the ground that they came down before *Rosenberger v. Rector & Visitors of University of Virginia*, ___ U.S. ____, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and *Rosenberger* now prohibits the content or viewpoint discrimination they allowed. That misreads *Rosenberger*. The university which lost *Rosenberger* paid expenses for virtually all student organizations, but denied the money to plaintiffs because they expressed a Christian viewpoint. In its zeal to steer clear of the establishment clause, the university, like the school district in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), overlooked the free speech clause.

Rosenberger holds that a university which makes money generally available for student groups' expenses, to encourage a diversity of views rather than to express its own, cannot discriminate against an applicant based on that applicant's viewpoint. *Rosenberger* teaches that when government makes a benefit generally available to all within a diverse class, it cannot make an exception based on what a particular applicant wishes to say. This extends *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), from space to money, thereby preventing discrimination against speech on the ground that it was religious. A public forum can be created by money, not just real estate. This is because speech is often disseminated by print and electronics, rather than by standing in front of people and talking to them. *Cf. Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612, 634, 46 L.Ed.2d 659 (1976).

We and the District of Columbia Circuit had decided, before *Rosenberger*, what might be classified as money-as-a-public-forum cases. In *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir.1980), we held that customs duties exemptions for any educational or cultural materials could not exclude propaganda films based on their content and viewpoint. In *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C.Cir. 1980), the District of Columbia Circuit held that a tax exemption generally available to educational organizations could not be denied based on a regulation requiring full and fair exposition of facts enabling a reader to draw an independent conclusion. Under these cases, all applicants in the class were entitled to the financial benefit from the government, unless the content of their speech was contrary to govern-

ment standards. By contrast, in the case at bar, no applicant is entitled to the financial benefit.

The case at bar would be analogous to *Rosenberger* (and I would join the majority in rejecting the "decency and respect" clause as unconstitutional), if the NEA gave out grants to virtually all artists except for those whose work violated "general standards of decency and respect for the diverse beliefs and values of the American public." Arts grants would then be the financial equivalent of a tax credit for all artists, and under *Rosenberger*, *Big Mama Rag* and *Bullfrog*, the financial benefit could not be conditioned on a vague and content- or viewpoint-based criterion like the "decency and respect" formula. Much as parade permits may be allocated on a first come first served principle, but not to favor particular viewpoints, arts grants would have to be allocated on some neutral principle, such as first come first served, or random selection. *Cf. Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2519.

It is not the case that whenever the government gives money to someone for talking, the recipient may say, with the government's money, whatever he or she likes. The government can hire people to say what it wants, and require them to say it.

> [W]hen government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2519 (explaining *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991)). But when the government gives money to encourage a diversity of views from private speakers in a class not defined by what they say, such as university students, it "may not silence the expression of selected viewpoints." *Id.*

The majority misreads *Rosenberger's* rejection of the University of Virginia's argument that scarcity of money justified viewpoint discrimination. *Rosenberger*, ___ U.S. at ____ - ____, 115 S.Ct. at 2519- 20. The context was a program in which grants went to virtually all speakers but those with a Christian viewpoint, not to everyone except for a few prize-winners. The Court explained that the Student Activities Fund at the University of Virginia "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Id.* at ____, 115 S.Ct. at 2517. This is the concept which I have expressed perhaps more crudely, as teaching us that a public forum can be created by money, not just real estate. Had the University of Virginia set up a prize fund, for student groups which contributed the most to the betterment of secular civic life in Charlottesville, the Christian student groups would have had no constitutional claim of discrimination had they lost. Had the NEA grant program been structured to award grants to virtually all artists, then the plaintiffs in the case at bar would be entitled to prevail under *Rosenberger*. The majority uses principles for entitlement and regulation cases in a prize case. The principles are by and large right, the application wrong.

When the government gives a prize rather than an entitlement, it necessarily discriminates by content

and viewpoint. Congress decided to foster the arts, but many Congressmen were doubtless aware of artists' tendency since the romantic period to challenge the conventional. Thus Congress imposed several content and viewpoint criteria for arts grants. These include "artistic excellence," promoting cultural diversity, and reflecting the culture of inner cities, rural areas, and tribal communities.[25] Congress

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[25] **(c) Program of contracts, grants-in-aid, or loans to groups and individuals for projects and productions; traditionally underrepresented recipients of financial assistance.** The Chairperson, with advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts, for the purpose of enabling them to provide or support—

(1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;

(2) projects [and] productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographical or economic reasons;

(3) projects [and] productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or standards of professional excellence;

(4) projects and productions which have substantial artistic and cultural significance and that reach, or

reflect the culture of, a minority, inner city, rural, or tribal community;

(5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts;

(6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;

(7) programs for the arts at the local level;

(8) programs that enhance managerial and organizational skills and capacities;

(9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purposes of broadening public access to the arts; and,

(10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection. . . . .

(d) Application for payment; regulations and procedures. No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with the regulations and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—

(1) artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public*; and

(2) applications are consistent with the purpose of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this Act from the National

thereby discriminated against non-artistic expressions of opinion, artistic expression favoring cultural homogeneity, and art reflecting suburban culture. Norman Rockwell and Ansel Adams could reasonably complain, were they applying for grants, that the statute constitutes viewpoint discrimination against their artistic expression.

Of course the statutory criteria are vague. "Decency and respect for the diverse beliefs and values of the American people" is vague. "Artistic excellence" and "artistic merit" are also vague, and could not be proper criteria for censorship or discrimination in an entitlement program. The constitution would not allow the government to censor expression on the ground that it was not art, or though art, was not excellent art. But this does not mean that the government cannot condition prizes on the excellence of art.

Philosophers have no way to distinguish art from non-art, or good art from bad art. There is not even a useful vocabulary for most of the distinctions we need to identify "artistic excellence":

> In certain kinds of writing, particularly in art criticism and literary criticism, it is normal to come across long passages which are almost completely lacking in meaning. Words like *romantic*, *plastic*, *values*, *human*, *dead*, *sentimental*, *natural*, *vitality*, as used in art criticism, are strictly meaningless, in the sense that they not only do not point to any discoverable object, but are hardly ever expected to do so by the reader. When one critic writes, "The outstanding feature of Mr. X's work is its living quality," while another writes, "The immediately striking thing about Mr. X's works is its peculiar deadness," the reader accepts this as a simple difference of opinion. If words like *black* and *white* were involved, instead of the jargon words *dead* and *living*, he would see at once that the language was being used in an improper way.

George Orwell, *Politics and the English Language, in A Collection of Essays* 156, 161-162 (emphasis in original) (essay dated 1946).

The most used art history text points out the vagueness of the entire NEA grant scheme:

> But if we must give up any hope of a trustworthy rating scale for artistic quality, can we not at least expect to find a reliable, objective way to tell art from non-art? Unfortunately, even this rather more modest goal proves so difficult as to be almost beyond our powers.

H.W. Janson, *History of Art* 9 (1962). It took a century and a half for most critics to agree that photography could be art. Some have not yet admitted jazz to the pantheon, many, rock and roll. Some disagree on whether Bernstein's *West Side Story* is art or mere entertainment, let alone excellent art. If the constitutional law principle prohibiting vague laws relating to speech applied to NEA grants, then we

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> Endowment for the Arts. The disapproval or approval of an application by the Chairperson shall not be construed to mean, and shall not be considered as evidence that, the projects, production, workshop, or program for which the applicant requested financial assistance is or is not obscene.

20 U.S.C. § 954(d) (emphasis added). The 1990 amendment added the emphasized language to 20 U.S.C. § 954(d).

could no more let the government give out grants for excellent art, than let it censor literary and artistic expressions which in the opinion of some customs agent or policeman (or art critic) were bad art.

The majority says that the vagueness of "artistic" and "excellence" are constitutionally permissible, unlike "decency" and "respect," because the people making the decisions are experts. Maj. op. at 680-81, n. 18. By that principle, it would be permissible to let the government censor speech with vague laws, so long as the censors were experts in the field being censored. The argument is wrong, because the panel members' purported expertise does not give fair warning to artists of what will get them grants and what will not. Nor are the purported experts' choices sufficiently constrained by "artistic" and "excellence" to prevent arbitrariness. Quite a few NEA grants have gone to activities which many experts would deem not excellent, or not art. There is no principled way to keep the arts grants but strike the decency and respect clause. Either Congress can provide for arts grants with vague criteria, or it cannot provide for them at all.

Artists seeking grants have no property right to them, and their liberty to express themselves as they choose is not regulated by the grants. Vagueness law has been developed under the Fifth Amendment to protect people from the taking of liberty or property without fair notice of what they may not do, and without protection against arbitrary enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). First Amendment vagueness doctrine applies to government action relating to speech if the government regulates speech or conditions a generally available benefit upon the

content of speech. *See Rust v. Sullivan*, 500 U.S. 173, 200, 111 S.Ct. 1759, 1776, 114 L.Ed.2d 233 (1991) ("conditions attached to expenditures of Government funds"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051, 111 S.Ct. 2720, 2732, 115 L.Ed.2d 888 (1991) ("prohibition against vague regulations of speech"). An artist applying for an NEA grant has no formula, and is not entitled to one, for the painting or performance which will produce a grant. None of the purposes of vagueness law apply to prizes.

The majority construes the statute as though it prohibited the NEA from awarding grants to offensive or indecent art. I doubt it would matter if the statute said that. Congress may be free to condition these scarce NEA grants on content. If Congress hired a sculptor to create a bust for the Capitol, it could tell him to do a bust of Abraham Lincoln, and prohibit him from doing a bust of John Wilkes Booth. Or it could tell the sculptor to make busts only of people who had served in the Senate, or perhaps only of "great" Senators, despite the vagueness of that criterion. That much is clear under *Rust*. Just as Fulbright grants to foreign students may be conditioned on "directing their talents and initiative into channels which will make them more effective leaders," 22 U.S.C. § 2454(e)(3), prizes for only a few applicants, to which no one is entitled, may be conditioned on vague criteria designed to serve particular congressional objectives.

Even if we were to suppose that a specific prohibition of NEA grants based on content or viewpoint would be unconstitutional, the majority has found prohibitions in the statute which are not there. We should not read a statute as though it prohibited what it does not, and then hold it unconstitutional for the

imaginary prohibition. The statute does not say that artists must "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." It says "the Chairperson" of the National Endowment of the Arts must use "artistic excellence" and "merit" as criteria, "taking into consideration," etc.

The words "take into consideration" mean take into consideration, no more, no less. The word "consider" in its ordinary usage means "to reflect on" or "think about with a degree of care or caution." *See Webster's Third New International Dictionary* 483 (1981). In deciding whether to buy a new car, *one takes into consideration* the expense, but that does not mean one always decides against buying a new car. A requirement that "due consideration and weight shall be given" to something does not make the thing an absolute requirement. *See Heirens v. Mizell*, 729 F.2d 449, 460 (7th Cir.1984) (parole board had to consider a prisoner's record but could decide against parole despite a good record). A court of appeals appoints a federal public defender "after considering recommendations from the district court." 18 U.S.C. § 3006A(g)(2)(A). That means that we must give serious thought to the district court's recommendations, but we are not required to follow them.

Likewise, the NEA might think seriously about Ginsberg's extensive use of vulgar language in *Howl* and *Kaddish*, and decide against funding readings of his poems in junior high schools. But after considering the indecency and offensiveness, the NEA could lawfully fund readings in colleges. It might likewise decide for or against funding showings of artistically excellent but highly offensive works such as Leni Riefenstahl's Nazi propaganda movie, *Triumph of the*

Will, or D.W. Griffith's artistically important movie *Birth of a Nation*, which glorified the Ku Klux Klan. If someone on an advisory panel said "I don't think we can consider the indecency or disrespect for American values of the art—we should fund the grants because the presentations will be of excellent art, and that is all we should consider," another panel member could persuasively reply, "we can and must consider decency and respect—Congress said we should." That is what the "decency and respect" language means, and that is all it means. Chairman Frohnmayer and the members of NEA grants panels probably would have figured out that they lived in a "political world," *see* maj. op. at p. 676, n. 7, and that the NEA budget might be affected by what it did with the money, even if Congress had not given them the decency and respect criterion.

By contrast with the "take into consideration" language, Congress said that obscenity "shall not be funded." 20 U.S.C. § 954(d)(2). That language, unlike "taking into consideration," prohibits funding. The language we now hold unconstitutional tells the Council and panels to think seriously about "general standards of decency and respect for the diverse beliefs of the American public" when they give away the public's money.

The artists in the program before us are not affected by the statutory grant criterion in their use of indecency or disrespect in their art done independently of their NEA grants. If the NEA were restricted from giving grants to artists who, outside the grants, had ever done indecent or offensive work, the considerations would be different, possibly leading to a different result. *Cf. Federal Communications Commission v. League of Women Voters*, 468 U.S.

364, 399-400, 104 S.Ct. 3106, 3127-28, 82 L.Ed.2d 278 (1984) (acceptance of the government's money unconstitutionally required the recipient to conform to government speech requirements outside the time paid for by the government). The government cannot use its power to condition subsidies as a means of enforcing orthodoxy in areas traditionally open to the public for expressive activity. *Rust*, 500 U.S. at 199, 111 S.Ct. at 1776; *Regan*, 461 U.S. at 548, 103 S.Ct. at 2002.

A prize for some art naturally encourages other artists to try to produce art of the sort which they think will get them the prize, including conformity to the content and viewpoint preferences of those who award the prizes. The members of the grant committees will probably balance their personal tastes against what they fear might lead Congress to cut NEA funding. If government selects a few artists and gives them money, it will unavoidably influence the work of many more:

> I can seldom do positive good to another person without limiting him. I can, it is true, simply give him money, but even in this extreme case, where I seem to place no bonds on him, he inevitably faces the question of what conduct on his part will lead me to give money to him again.

George J. Stigler, *The Intellectual and the Market Place* 95 (1963). This is a problem of governmental involvement in what used to be a private activity, not a problem of censorship. The United States government has so much money and power that its slightest intervention to do good has the unfortunate effect of changing the entire context in which people act. But unless we are to blind ourselves to the distinction

between a relatively few arts prizes, and socializing the art industry, we cannot treat the incentive afforded by a prize as the equivalent of censorship.

The artists who brought this lawsuit may have difficulty (the record does not say) attracting enough patrons to support their art. Finley alleges in her complaint that she is a "performance artist whose performances address such issues as the sexual stereotyping and objectification of women, rape and other forms of violence against women, and the powerlessness and victimization of women and others in our society." Fleck alleges that his performances "openly challenge traditional notions of gender and sexuality" and "address AIDS, birth, death, religion, consumption in a capitalist society, and the environment." Hughes alleges that her work "addresses issues of women's power in society and women's sexuality, including lesbian relationships." Miller alleges that his "often autobiographical work addresses the relation between the individual and society, and particularly concerns social activism on issues affecting gay people, including AIDS." These works may lack the mass market of art appealing to more broadly shared sentiments.

There is no constitutional principle, however, which requires the government to replace the market and pump up the incomes of less popular artists. Government support of the arts is a policy choice, and perhaps a good one, but it is not constitutionally compelled. Lack of market appeal is an obstacle "not of [the government's] own creation." *Regan v. Taxation with Representation Wash.*, 461 U.S. 540, 549-50, 103 S.Ct. 1997, 2003, 76 L.Ed.2d 129 (1983). So long as the artists are free to perform, people are free to patronize their performances, and the artists are not

deprived of government money to which artists generally are entitled, the artists' freedom of expression is not abridged by content or viewpoint discrimination in the grant process.

The only practical guarantee of artistic freedom is private money.

> The leadership of individuals or groups who can back their beliefs financially is particularly essential in the field of cultural amenities, [and] in the fine arts. . . . If minority views are to have a chance to become majority views, it is necessary not only that men who are already highly esteemed by the majority should be able to initiate action but that representatives of all divergent views and tastes should be in a position to support with their means and their energy ideals which are not yet shared by the majority.

Friedrich A. Hayek, *The Constitution of Liberty* 125 (1960, 1978). With diverse sources of private money, majority preferences need not affect an artist's freedom or fortune, because only one or a few patrons or purchasers may suffice.

First Amendment law protects individual liberty from government, not the government from the people. The error in today's decision comes from forgetting what the First Amendment is for. The NEA "decency and respect" criterion controls, not artists, but rather a government department, the NEA. By treating legislative control over a part of government as though it were an attempt to control artists' expression, we confound the distinction between popular control of government, and government control of individuals. Majorities do not have the right to control free expression by individuals.

They most certainly do have the right to control their government. Today's decision does not protect artists from government. It protects the government from control by the elected representatives of the people.

APPENDIX B

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA

No. CV 90-5236 AWT

KAREN FINLEY, JOHN FLECK, HOLLY HUGHES, TIM MILLER AND NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS

v.

NATIONAL ENDOWMENT FOR THE ARTS; AND JOHN E. FROHNMAYER, IN HIS OFFICIAL CAPACITY AS CHAIRPERSON NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS

June 9, 1992

MEMORANDUM OPINION

TASHIMA, District Judge.

Plaintiffs are four individual performance artists ("individual plaintiffs") and the National Association of Artists' Organizations ("NAAO"). Individual plaintiffs allege that defendants the National Endowment for the Arts ("NEA") and John E. Frohnmayer

("Frohnmayer"),[1] NEA Chairperson, violated their constitutional and statutory rights by improperly denying their applications for NEA grants and by releasing to the public information from their application files. They seek declaratory and injunctive relief on their constitutional and statutory funding claims, and damages on the Privacy Act claim. In addition, all plaintiffs seek a declaration that the so-called "decency clause" of 20 U.S.C. § 954(d), enacted several months after individual plaintiffs' applications were denied, is void for vagueness and violates the First Amendment on its face.

Before the court are two motions. The first is defendants' motion for judgment on the pleadings. Defendants contend that: (1) the NEA's funding decisions are unreviewable because they are committed to agency discretion by law; (2) venue is improper as to the Privacy Act claim; and (3) plaintiffs lack standing to challenge the facial validity of the "decency clause" because they cannot establish the necessary injury.

Plaintiffs, in turn, have moved for summary judgment on their facial challenge to the "decency clause."

I. BACKGROUND

A. *Statutory framework*

The NEA was created by Congress in 1965 as part of the National Foundation on the Arts and the Humanities (the "Foundation"). In establishing the Foundation, Congress found that "it is necessary and

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[1] Frohnmayer resigned as Chairperson of the NEA after this action was commenced. No successor has been appointed. Anne-Imelda Radice is the acting Chairperson.

appropriate for the federal government to help create and sustain not only a climate encouraging freedom of thought, imagination and inquiry but also the material conditions facilitating the release of . . . creative talent." 20 U.S.C. § 952(5).[2] It was the intent of Congress to encourage "free inquiry and expression," and to insure that "conformity for its own sake is not to be encouraged" and that "no undue preference should be given to any particular style or school of thought or expression." 111 Cong. Rec. 13,108 (1965).

One of three components of the Foundation, the NEA is authorized to administer a program of grants-in-aid to individuals of exceptional talent engaged in or concerned with the arts. 20 U.S.C. § 954(c). The NEA acts through its Chairperson and a 26-member National Council on the Arts (the "Council"), all of whom are appointed by the President, by and with the advice and consent of the Senate. 20 U.S.C. § 954(b)(1) & § 955(b). The Chairperson is the ultimate decision maker; however, the Chairperson is prohibited from approving or disapproving any grant application until he or she has received the recommendation of the Council on such application.[3]

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[2] The Arts, Humanities, and Museums Amendments of 1990 (the "1990 Amendments"), Pub.L. No. 101-512, § 101, 104 Stat. 1961, made a minor grammatical change in and redesignated this clause as subsection (7). *See* 20 U.S.C. § 952(7). Because the funding denials occurred prior to the 1990 Amendments, citations are to the pre-amendment version of the statute, except where otherwise indicated.

[3] In the case of an application involving $30,000, or less, the Chairperson may approve or disapprove such request without first receiving the recommendation of the Council if such action is taken pursuant to the terms of a delegation of

20 U.S.C. § 955(f). The Council, in turn, is required to meet at the call of the Chairperson, and 14 members of the Council constitute a quorum. 20 U.S.C. § 955(d). The Chairperson is also authorized to utilize panels of experts to review funding applications. 20 U.S.C. § 959(a)(4).[4]

On November 5, 1990, approximately four months after individual plaintiffs' applications were denied, in the 1990 Amendments, Congress amended the NEA's governing statute in several respects. Among the changes was the addition of a provision requiring that "general standards of decency and respect for the diverse beliefs and values of the American public" be taken into consideration in making funding determinations. 1990 Amendments, Pub.L. No. 101-512, § 103(b), 104 Stat. 1963, codified at 20 U.S.C. § 954(d).

B. *Political context of the denials*

At least since 1989 and continuing through to the present, the NEA has been the target of congressional critics and private interest groups for funding works, inter alia, that express women's anger over male dominance in the realm of sexuality or which endorse equal legitimacy for homosexual and heterosexual practices.[5] For example, in the Spring of

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authority from the Council to the Chairperson, and each such action is reviewed by the Council. 20 U.S.C. § 955(f).

[4] The 1990 Amendments made mandatory the Chairperson's use of advisory panels to review funding applications. *See* 20 U.S.C. § 959(c).

[5] The facts in this section are drawn from the complaint, which must be taken as true for purposes of defendants' motion for judgment on the pleadings. *See, e.g., General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist*

1989, congressional critics assailed the NEA for funding two controversial projects: a photography exhibit by Robert Mapplethorpe, which included homoerotic images, and an exhibit by Andres Serrano[6] entitled "Piss Christ," which was criticized as sacrilegious. *E.g.*, 135 Cong. Rec. S5594 (daily ed. May 18, 1989) (statement of Sen. D'Amato); 135 Cong. Rec. S5805 (daily ed. May 31, 1989) (statement of Sen. Gorton). These two exhibits were frequently cited by members of Congress in debates during the Summer of 1989 over budget allocations for the NEA. *E.g.*, 135 Cong. Rec. H3637, H3640 (daily ed. Jul. 12, 1989) (statements of Reps. Rohrabacher and Dannemeyer).

These funding debates were followed by a series of demands by certain members of Congress for information on NEA-funded artists whose work addressed political and sexual issues. In one instance, a senator requested that the General Accounting Office investigate apparent violations of § 304 of the FY 1990 NEA appropriations bill.[7] The senator listed among such

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Congregational Church, 887 F.2d 228, 230 (9th Cir.1989), *cert. denied*, 493 U.S. 1079, 110 S.Ct. 1134, 107 L.Ed.2d 1039 (1990).

[6] Serrano is one of the many amici curiae in this case.

[7] That section provided, in part:

> None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.

"apparent violations" three literature fellowships awarded to lesbian writers who address issues of sexuality in their work; two art exhibits, one of which incorporated images depicting homosexuality and the other of which included depictions of genital organs; and appearances by plaintiff Finley at two NEA-funded theaters.[8]

In addition, private special interest groups ran advertisements and circulated flyers condemning NEA funding of sexually-related works and in one case called for defunding of the NEA. In response to criticism by the American Family Association of one art exhibit, Frohnmayer wrote in April 1990 that its images "were disgusting and offensive to me, and undoubtedly to a large majority of the population. I would hope that with the procedures I am implementing at the arts endowment, images such as these would not again be funded."

C. *Denial of plaintiffs' applications and violations of the Privacy Act*

In the midst of this political maelstrom, individual plaintiffs each applied for funding under the Performance Artists Program. These applications were among the 90 applications reviewed by the Perform-

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Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741. The NEA's administration of § 304 was struck down in *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991).

[8] The general counsel of the NEA, Julianne Ross Davis, sent a number of explanatory letters to Henry Wray, Senior Associate General Counsel, General Accounting Office, on this subject. The summary judgment record contains six such letters, dated Apr. 3, May 2, 9, 24 & 30, and Jul. 5, 1990.

ance Artists Program Peer Review Panel (the "Panel"). The Panel unanimously recommended that the individual plaintiffs' applications be funded, along with 14 others in that category.[9]

In early May 1990, Frohnmayer asked the Panel to reconsider three of its recommendations, those for plaintiffs Fleck, Hughes and Miller. He stated that reconsideration of Finley's application was unnecessary because two of his close friends had attended a Finley show and had reported to him that it was not obscene. He arranged for an extraordinary Panel meeting by teleconference, in which he personally participated. After reconsidering the three grants, the Panel again unanimously recommended them for funding.

Shortly before the Council met to review recommended NEA grants and fellowships, a syndicated column published in Washington, D.C., reported that plaintiff Finley had been recommended to receive a grant and criticized the content of her work. The article contained a quotation from Finley's funding application, which the NEA admittedly released to the press. The column also stated that Frohnmayer had been "advised" by "friends" of the NEA to veto several grants, including Finley's, to "ease President Bush's deepening troubles with conservatives on his suspect cultural agenda."

Although the Council convened in May and acted on other categories of recommended grants, it deferred consideration of the Performance Artists Program fellowships until its August meeting, pending receipt

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[9] As a matter of practice and custom, recommendation by a peer review panel has been tantamount to the granting of an application.

of further information. In June 1990, Frohnmayer polled members of the Council by individual telephone calls regarding the Performance Artists Program fellowships. On June 28, 1990, the NEA advised individual plaintiffs that their applications had been denied.

Subsequent to these denials, a number of newspaper articles published references to or direct quotations from plaintiffs' NEA application files. A number of these articles cite the NEA as the source of this information. None of the individual plaintiffs consented to any of these disclosures.

D. *Plaintiffs' claims*

Following notification that their applications had been denied, plaintiffs filed this action. Individual plaintiffs assert that defendants violated their First Amendment rights by denying their applications on impermissible political grounds and by failing to adhere to procedural safeguards mandated by the First Amendment. They also allege that defendants violated their statutory rights under the National Foundation on the Arts and the Humanities Act of 1965, as amended, 20 U.S.C. § 954-55, by (a) basing the denials on criteria other than those set forth by statute, and (b) failing to follow the procedures mandated by statute. Individual plaintiffs also allege that defendants violated their rights under the Privacy Act, 5 U.S.C. § 552a, by violating the confidentiality of their grant applications.

After Congress amended 20 U.S.C. § 954(d) to require that "general standards of decency" be taken into account in evaluating funding applications, the NAAO joined individual plaintiffs in filing an amended complaint, challenging this new provision on Fifth

Amendment vagueness and First Amendment grounds.

II. DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS[10]

A. *First Amendment claims*

The amended complaint alleges that defendants injured plaintiffs' First Amendment interests by denying their applications because of the content of their past artistic expression and by failing to provide a written statement of reasons for the denial.

1. Content-based funding denial

Defendants argue that the denial of plaintiffs' grant applications does not constitute injury to plaintiffs' First Amendment interests because the denial is merely a refusal to subsidize plaintiffs' expressive activities—not a barrier to their exercise. However, it is well-established that

> even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of

[10] Judgment on the pleadings is proper when the moving party clearly establishes on the face of the complaint, accepting its allegations as true, that it is entitled to judgment as a matter of law. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). All inferences reasonably drawn from these facts must be construed in favor of the responding party. *General Conference Corp. of Seventh-Day Adventists*, 887 F.2d at 230.

> speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, [357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)]. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). The Supreme Court recently reaffirmed this rule in *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). There the Court stated that the government creates an "unconstitutional condition" when it

> place[s] a condition on the recipient of the subsidy rather than on the particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

Id. 111 S.Ct. at 1774 (emphasis in original).

Defendants correctly argue that denial of a benefit imposes an unconstitutional condition only when the benefit is conditioned on the recipient's surrender of (or is imposed as a penalty for) constitutionally protected activity *distinct* from that to be funded by the subsidy. *See Rust, id.* (no unconstitutional condition imposed where grant recipients remain free to engage in abortion-related speech with non-grant funds); *compare Perry v. Sindermann*, 408 U.S. at 597, 92 S.Ct. at 2697 (termination of state university employee because he criticized the university's regents constitutes an unconstitutional condition).

However, defendants' contention that the present case does not fall within this proscription is simply wrong.

The amended complaint alleges that plaintiffs applied for funding in a category designed to underwrite performers' professional growth and development, rather than to fund a specific work or project. Thus, the decision not to grant an application in this category cannot be categorized as a refusal to "subsidize" particular speech because the content of the expression generated through the grants cannot be known in advance. In addition, individual plaintiffs' allege that Frohnmayer requested that the Panel reconsider only three of the four applications, because "two of his close friends had attended a Karen Finley show and had reported to him that it was not obscene." This makes clear that plaintiffs complain that their applications were denied based on the content of their past performances, constituting in effect a penalty for past speech. As such, these allegations are sufficient to state a claims under the First Amendment. *Perry*, *id.* at 598, 92 S.Ct. at 2698. Defendants are not entitled to judgment on the pleadings on this claim.

2. Procedural Safeguards

Individual plaintiffs assert that the procedure used to deny their applications violates the First Amendment because defendants failed to set forth in detail and in writing a statement of reasons for the denials.

In support of this claim, plaintiffs cite *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), in which the Court imposed a procedural requirement on the government where the government acts to impose a prior

restraint. The Court there held that the government may impose a prior restraint on a speaker consistent with the First Amendment only if the government initiates and obtains prompt judicial review in which it bears the burden of establishing that the expression is unprotected. *Id.* at 560, 95 S.Ct. at 1247.

Southeastern Promotions does not provide support for the imposition of the procedural requirements requested by plaintiffs in this case. Because it is unsupported by any authority, plaintiffs' claim that defendants failed to provide them with a written statement of reasons for the denials does not state a claim under the First Amendment.

B. *Statutory claims*

In the Third and Fourth claims, individual plaintiffs allege that defendants violated the NEA's governing statutes and the Administrative Procedure Act ("APA") by (1) relying on political criteria not set forth in 20 U.S.C. § 954(c), and (2) by failing to comply with the statutory procedures mandated by 20 U.S.C. § 955. Defendants move to dismiss these claims on the grounds that funding decisions are unreviewable as actions committed to agency discretion, and that the procedure alleged in the amended complaint complies with statutory requirements.

1. Reviewability

The APA provides for judicial review of final agency action. 5 U.S.C. § 704. However, § 704 does not apply where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985). The Supreme Court has held that § 701(a)(2)

> is a very narrow exception. [] The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971) (citation and footnote omitted); *Heckler v. Chaney*, 470 U.S. at 830, 105 S.Ct. at 1655. In other words, "in order for § 701(a)(2) to apply, the matter must be one that a court cannot review even to determine whether the agency, exceeding the scope of its broad power, acted *unlawfully*." *NAACP v. Secretary of Hous. & Urban Dev.*, 817 F.2d 149, 157 (1st Cir. 1987) (emphasis in original).

The version of 20 U.S.C. § 954(c) in effect at the time plaintiffs' applications were denied provided that:

> The Chairperson, with the advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts, for the purpose of enabling them to provide or support
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> (1) projects and productions which have substantial artistic and cultural diversity and the maintenance and encouragement of professional excellence;
>
> (2) projects and productions meeting professional standards or standards of authenticity, irrespective of origin, which are of significant merit and which, without such assistance, would

> otherwise be unavailable to our citizens for geographic or economic reasons;
>
> (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;
>
> (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;
>
> (5) projects and productions that will encourage public knowledge, understanding, and appreciation of the arts;
>
> (6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;
>
> (7) programs for the arts at the local level; and
>
> (8) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

These criteria are sufficient to constitute "law to apply" in this case. For example, it is clear that the NEA would exceed its statutory authority if it were to allocate funds based solely on financial need or the ethnicity of the applicant, with no regard to the criteria listed in the statute. Thus, although the statute does confer the NEA with discretion to select

grant recipients, that discretion is not boundless. As the limitations of § 954(c) constitute "law to be applied," the § 701(a)(2) exemption for action "committed to agency discretion" is inapplicable. *See NAACP*, 817 F.2d at 158.

The amended complaint alleges that despite the Panel's unanimous recommendation that individual plaintiffs be awarded fellowships as "individuals of exceptional talent," Frohnmayer denied those fellowships for political reasons, *i.e.*, to appease congressional critics. Political expediency is neither an expressed nor implied criterion under the statute for the denial of an NEA grant. Plaintiffs' allegations are sufficient to state a claim under § 954(c) and the APA.

2. *Procedural violation*

Individual plaintiffs also allege that Frohnmayer's poll of individual Council members for their respective recommendations in the Solo Performance Theatre category violated the procedure mandated by the statute.

Under 20 U.S.C. § 955(f), the Chairperson may not award or deny a grant "until the Chairperson has received the recommendation of the Council on such application." In addition, 20 U.S.C. § 955(d) provides that, "The Council shall meet at the call of the Chairperson but not less often than twice during each calendar year. Fourteen members of the Council shall constitute a quorum."[11]

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[11] This section was amended by the 1990 Amendments to add reporting and record-keeping requirements, but the language quoted in the text remains intact. *See* Pub. L. No. 101-512, § 106, 104 Stat. 1968.

Plaintiffs contend that these two provisions, read together, clearly indicate that Congress intended that the Council should act as a collegial body in making recommendations to the Chairperson. In response, defendants argue that the statute contains no requirement "that Council members be collected in a single room or on a single telephone conference call when they convey their recommendation" and insist that this interpretation of the statute is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. *First, always, is the question whether Congress has directly spoken to the precise question at issue.* If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[ ] If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute,[ ] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[ ]

Id. at 842-43, 104 S.Ct. at 2781-82 (emphasis added; footnotes omitted).

In this case, congressional intent is clear from the statute itself. First, the use of the words "the

Council" rather than "Council *members* " indicates that Congress intended the Council to act as a body, not an aggregation of individuals, when making recommendations to the Chairperson. Second, the statute provides that the Chairperson may not act on applications until he or she "has received *the* recommendation of the Council." (Emphasis added.) The use of the definite article "the," together with the singular noun "recommendation," indicate an intent that the Council will arrive at a single, collective recommendation. A contrary intent would be expressed with language such as "the recommendations of Council members."

Further, if Congress intended that Council members act individually, and not collegially, in fulfilling their obligation, there would have been no need to establish the quorum requirement of § 955(d). Defendants' construction of the statute renders the quorum requirement superfluous.

Because congressional intent is clear, the court need not (indeed may not) reach the second question of whether the NEA's construction is permissible.

The APA authorizes the court to set aside agency action taken in violation of statutory procedures. 5 U.S.C. § 706(2)(D). Thus, these allegations are sufficient to state a claim upon which relief may be granted.

C. *Privacy Act claim*

Individual plaintiffs also allege that the NEA staff released information to the public from their application files in violation of the Privacy Act, 5 U.S.C. § 552a. Defendants acknowledge that the NEA was the source of these "leaks," but challenge this claim on the grounds that (1) venue is defective as to two

plaintiffs, (2) the Freedom of Information Act ("FOIA") required disclosure of the subject information and therefore immunizes defendants against liability under the Privacy Act, and (3) the information disclosed was already a matter of public record and therefore is not protected by the Privacy Act.

1. Venue

Defendants argue that venue is improper in this district under the Privacy Act's venue provision, 5 U.S.C. § 552a(g)(5), as to two individual plaintiffs, Finley and Hughes, because they do not reside or have their principal places of business in this district. The venue statute provides:

> An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy.

5 U.S.C. § 552a(g)(5).

Relying on cases construing the general venue statute of 28 U.S.C. § 1391(e),[12] applicable to actions in which the United States is a defendant, plaintiffs

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[12] Title 28 U.S.C. § 1391(e) provides in relevant part that a civil action in which a defendant is the United States, or an officer, employee or agency thereof, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

argue that venue is proper in this district as to all plaintiffs because venue is proper as to two of them. *See Exxon Corp. v. FTC*, 588 F.2d 895, 899 (3d Cir. 1978) (venue proper under § 1391(e) where at least one plaintiff resides in the forum district); *National Air Traffic Controllers Ass'n v. Burnley*, 700 F.Supp. 1043, 1045 (N.D. Cal. 1988) (same).

Defendants seek to distinguish these cases by arguing that the general venue statute is broader than the Privacy Act venue provision. While 28 U.S.C. § 1391(e) provides a different set of venue possibilities than is provided in 5 U.S.C. § 552a(g)(5), whether or not the former can be said to be more liberal than the latter misses the point. The reasoning of *Exxon Corp.* is equally applicable to the Privacy Act venue provision: "requiring every plaintiff in an action against the federal government or an agent thereof to independently meet [the statutory venue] standards would result in an unnecessary multiplicity of litigation" and "[t]he language of the statute itself mandates no such narrow construction." *Exxon Corp.*, 588 F.2d at 898- 99.

The court holds that in a multi-plaintiff Privacy Act action, if any plaintiff satisfies the venue requirement of 5 U.S.C. § 552a(g)(5), the venue requirement is satisfied as to the remaining plaintiffs. Because the statutory venue requirement is satisfied as to the Privacy Act claims of two plaintiffs, venue is proper as to all four individual plaintiffs.

2. The FOIA defense

Next, defendants argue that the release of information from individual plaintiffs' files is not actionable under the Privacy Act because release is *required* by FOIA.

The relevant portion of the Privacy Act provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any other person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> * * * * *
>
> (2) required under [FOIA,] section 552 of this title.

5 U.S.C. § 552a(b)(2).[13] FOIA, in turn, contains an internal privacy act of sorts that exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" from its disclosure requirements. 5 U.S.C. § 552(b)(6) (the "(b) (6) exemption").

The Supreme Court has construed the (b)(6) exemption broadly to "cover detailed Government records on an individual which can be identified as applying to that individual." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602, 102 S.Ct. 1957, 1961, 72 L.Ed.2d 358 (1982).

> When disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release

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[13] There is no dispute that NEA is an "agency" subject to this provision, or that the information released constitutes a "record which is contained in a system of records" within the meaning of this section.

of the information would constitute a clearly unwarranted invasion of that person's privacy.

Id. In *Washington Post* the Court held that a newspaper's request for "documents indicating whether [two individuals] . . . hold valid U.S. passports" was information "contained in personnel, medical or similar files" and therefore subject to the balancing test required by the (b)(6) exemption. *Id.* at 596, 598, 102 S.Ct. at 1959, 1960 (emphasis added).[14]

The amended complaint alleges that the NEA released information from individual plaintiffs' application files. Such information clearly "applies to [each of the] particular individual[s]" to which it corresponds, and thus may not be released under FOIA without consideration of the competing interests in personal privacy and public benefit.

3. Publicly available information

Finally, defendants argue that the information released was already publicly available; therefore,

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[14] In support of their position, defendants cite *Kurzon v. Department of Health and Human Serv.*, 649 F.2d 65 (1st Cir. 1981), in which plaintiff sought to compel disclosure under FOIA of the names and addresses of unsuccessful research grant applicants. Reversing summary judgment for defendant, the court rejected defendant's argument that such information was subject to FOIA's exemption for "personnel and medical files and similar files." The court reasoned that the (b)(6) exemption "was intended to shield against a variety of embarrassing disclosures . . . 'of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records.'" *Id.* at 68, *quoting Board of Trade v. CFTC*, 627 F.2d 392, 398 (D.C.Cir.1980). However, in *Washington Post* the Supreme Court explicitly rejected *Board of Trade*, the case on which *Kurzon* relied. *See Washington Post*, 456 U.S. at 598, 102 S.Ct. at 1959.

that disclosure cannot violate the Privacy Act. *See King v. Califano*, 471 F. Supp. 180, 181 (D.D.C. 1979) (officials who informed press that an Administrative Law Judge was removed due to severe mental and emotional problems did not "disclose" the information within the meaning of the privacy act because that information was "publicly known prior to . . . publication"). However, case law in this Circuit is contra. *See Covert v. Herrington*, 667 F.Supp. 730, 739 (E.D. Wash. 1987) (information obtained from public sources and then released to an outside agency constitutes "disclosure" within the meaning of the Privacy Act), *aff'd*, 876 F.2d 751 (9th Cir. 1989); *see also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 753, 780, 109 S.Ct. 1468, 1471, 1485, 103 L.Ed.2d 774 (1989) (recognizing a categorical exemption under FOIA for private citizen "rap sheets," although the data are compiled from publicly available documents).

Thus, even if it were clear from the face of the amended complaint that the information released was already a matter of public record, in this Circuit, the allegations state a claim for relief under the Privacy Act.

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

All plaintiffs move for summary judgment on the Sixth Claim, which alleges that the "decency clause" is impermissibly vague under the Fifth Amendment Due Process Clause and violates the First Amendment on its face. In opposition, defendants argue that (1) all plaintiffs lack standing to challenge this provision; (2) the vagueness challenge fails on the merits because the NEA has implemented a limiting con-

struction of the clause that cures any ambiguity; and (3) as construed by the agency, the provision does not injure any artist's First Amendment interests.

A. *Standing*

Defendants first argue that plaintiffs do not have standing to challenge § 954(d) because (1) allegations of "chill alone" cannot support standing and (2) plaintiffs cannot demonstrate any threatened or actual injury from the challenged provision.

To establish standing, a plaintiff must show that (1) "he personally has suffered some actual or threatened injury" as a result of defendants' actions; (2) the injury "fairly can be traced to the challenged action"; and (3) the injury is "likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

Citing *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26, 33 L.Ed.2d 154 (1972), defendants contend that plaintiffs' allegation of a "chilling effect" is insufficient to establish the required "actual or threatened injury" under the *Valley Forge* test. In *Laird*, a group of citizens sued to enjoin an Army program that gathered and stored information about protest marches and demonstrations. The Court found that *Laird* plaintiffs lacked standing because they had simply read about the Army program in the newspaper and could not explain "the precise connection between the mere existence of the challenged system and their alleged chill." *Id.* at 13 n. 7, 92 S.Ct. at 2325 n. 7.

Individual plaintiffs argue that *Laird* is factually distinguishable because all individual plaintiffs here

have, in the past, been denied grants based on the controversial content of their expression. Also, individual plaintiffs Hughes and Miller applied for and were awarded NEA grants in 1991 under the new standard. Hughes claims that, as a result of the "decency" standard, she believed it necessary to defend her work against charges of indecency and addressed this issue in her funding application rather than elaborating on her work and its goals. Both Hughes and Miller claim that the existence of the "decency" provision circumscribes their artistic freedom because they fear stepping across an invisible line of "decency" which would result in forfeiture of some or all of their 1991 grants and disqualification for future grants.[15]

Plaintiffs contend that these facts are analogous to those presented in *Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 95 S.Ct. 425, 42 L.Ed.2d

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[15] Applicants are required as part of the application process to submit an assurance that their projects or productions "will meet the standards of artistic excellence and artistic merit required by this subchapter." 20 U.S.C. § 954(i)(4). That standard now includes a consideration of "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1). In addition, recipients are required to file an interim report that includes a description of her or his compliance with "the subchapter" (which includes the "decency" standard). 20 U.S.C. § 954(i)(3)(A)(ii).

Grant funds are distributed in installments, and payments may be suspended if the Chairperson determines that the recipient is not in compliance with § 954 or any other conditions of the grant. 20 U.S.C. § 954(j). In addition, failure to satisfy the purposes for which the assistance was provided may be taken into account in determining whether to provide any subsequent financial assistance. 20 U.S.C. § 959(f)(3)(A).

627 (Marshall, Circuit Justice, 1974). There, Justice Marshall refused to stay the reversal of an injunction barring the government from conducting surveillance at a youth organization conference. He first found that the plaintiffs had standing to maintain the action. Distinguishing *Laird*, he held:

> In this case, the allegations are much more specific: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some YSA delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed "chill" is substantial or not is still subject to question. The specificity of the injury claimed by the applicants is sufficient, under *Laird*, to satisfy the requirements of Article III.

Id. at 1319, 95 S.Ct. at 428.

At a minimum, plaintiffs Hughes and Miller, who have applied for and received funding under the new statute, have standing because they risk forfeiting their grants if they engage in behavior determined by the NEA to be in contravention of the decency provision. These plaintiffs face threatened and actual harm because, in order to retain their grants and to ensure that they are considered for future grants, they must now restrict their expressive conduct, which is otherwise protected by the First Amendment.

The standing of individual plaintiffs Finley and Fleck, who did not apply for grants, is less clear because they allege only that they have forgone their application opportunity out of "fear" that they would

be denied funding. However, as Hughes and Miller have met the "injury" prong, it is unnecessary to the resolution of the substantive claim that the court determine the standing of the remaining individual plaintiffs. *See Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264 n. 9, 97 S.Ct. 555, 562 n. 9, 50 L.Ed.2d 450 (1977).

In addition, the NAAO has standing both on its own behalf and as a representative of its members who have applied for grants. First, NAAO's expenditure of resources to advocate against the decency standard and to assist its members in responding to the standard creates a cognizable injury to that organization. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982) (alleging injury to organization's activities and consequent drain on its resources satisfies injury requirement for organization to assert standing in its own right); *see also El Rescate Legal Serv., Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1992) (accord); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir.) ("organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action"), *cert. denied*, 498 U.S. 980, 111 S.Ct. 508, 112 L.Ed.2d 521 (1990).

Moreover, NAAO satisfies the requirements for representative standing based on injury to its members. First, the Director of the NAAO reports that, like Hughes and Miller, some members have received NEA grants under the new standards, but are "chilled" in the scope of their work and their applications by uncertainty as to how to comply with the decency clause. Second, this suit seeks to protect

freedom of artistic expression, an interest germane to NAAO's organizational purpose. Lastly, neither this claim nor the requested relief requires the individual participation of NAAO members. *See International Union, UAW v. Brock*, 477 U.S. 274, 282, 106 S.Ct. 2523, 2528, 91 L.Ed.2d 228 (1986) (listing requirements for representative organizational standing).

B. *Statutory Construction*

Because the court must avoid deciding a constitutional issue if possible, it is first necessary to determine whether § 954(d)(1), as amended, can be construed to avoid conflict with constitutional proscriptions.

Defendants advance two possible constructions of the statute which they contend avoid constitutional infirmity. Defendants contend (1) that the decency provision does "not impose content restrictions on NEA grant decisions," but "merely implements a method for selecting review panel members" and, alternatively, (2) that "decency" and "respect . . . are factors only to the extent that they are implicit in the assessment of artistic merit."

Again, under *Chevron*, the initial question is whether congressional intent on the issue is clear. Section 954(d), as amended in 1990, provides that

> artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration* general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. § 954(d)(1) (emphasis added). The plain language of the statute requires that "general standards of decency and respect for the diverse beliefs and

values of the American public" be "tak[en] into consideration" in judging applications.[16]

Thus, it is clear from the language of the statute that "decency" and "respect" for diverse beliefs *are* factors to be considered in determining "artistic merit," and therefore eligibility for funding.

Even had the statute itself not been clear, neither of defendants' constructions is entitled to deference because both are "manifestly contrary to congressional intent." *See Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782; *Railway Labor Executives' Ass'n v. ICC*, 958 F.2d 252, 256 (9th Cir. 1992) (where congressional intent is ambiguous, the agency's construction controls "unless it is 'arbitrary, capricious or manifestly contrary to the statute'").

First, a construction that this clause "merely implements a method for selecting review panel members" cannot be given effect for it would render 20 U.S.C. § 959(c), as amended by the same act that added the "decency" provision, superfluous.[17] *See Freytag*

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[16] In addition to this plain language, the plethora of comments in the Congressional Record indicates that the "decency" provision was intended to act as a bar to funding controversial projects or artists. *See, e.g.*, 136 Cong. Rec. H9410-57 (daily ed. Oct. 11, 1990) (statements by members of Congress explaining that the "decency" provision would preclude funding of works such as Andres Serrano's "Piss Christ" and others that would "deeply offend the sensibilities of significant portions of the public").

[17] 20 U.S.C. § 959(c) now reads in relevant part:

> The Chairperson of the National Endowment for the Arts shall utilize advisory panels to review applications, and to make recommendations to the National Council on the Arts . . . When reviewing applications, such panels shall recommend applications for projects, productions, and workshops solely on the basis of artistic excellence and

v. Commissioner, 501 U.S. 868, 111 S.Ct. 2631, 2638, 115 L.Ed.2d 764 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment'"). Because § 959(c) requires that the composition of Peer Review Panels reflect "wide geographic, ethnic, and minority representation as well as . . . diverse artistic and cultural points of view," a construction of the decency provision as requiring only the diversification of panel membership would render the "decency" clause of § 954(d) without legal content.

Second, defendants' alternative construction (*i.e.*, that "decency" and "respect" are factors only to the extent that they are implicit in the assessment of artistic merit) is also manifestly contrary to congressional intent. It defies logic to argue that explicit additions to the "artistic merit" standard are merely implicit in the assessment of artistic merit. Had Congress believed that "decency" and "respect for diverse views" were naturally embedded in the concept of "artistic merit," there would be no need to elaborate on that standard.

C. *Vagueness*

The Fifth Amendment due process clause requires that a statute be sufficiently clearly defined so as not to cause persons "of common intelligence—necessarily [to] guess at its meaning and [to] differ as

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artistic merit. The Chairperson shall issue regulations and establish procedures—

(1) *to ensure that all panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view.*

to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). In the area of expressive conduct, vague laws offend several important values: (1) they may trap the innocent by failure to provide fair warning; (2) they may fail to provide explicit and objective standards and therefore permit arbitrary and discriminatory enforcement; and (3) they may inhibit First Amendment freedoms by forcing individuals to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108- 09, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972) (internal quotation marks omitted); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512-13 (9th Cir. 1988).

Plaintiffs and amici argue, at length, that the decency provision is vague and should be refused effect under both the First and Fifth Amendments. Citing a number of Supreme Court opinions, they contend that words such as "decency" and "respect" are inherently subjective. *See Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1249, 39 L.Ed.2d 605 (1974) ("what is contemptuous to one [person] may be a work of art to another"); *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971) ("one [person]'s vulgarity is another's lyric"). In addition, they point out that such words as "decency" and "respect" are contentless in the context of American society: the very nature of our pluralistic society is that there are an infinite number of values and beliefs, and correlatively, there may be no national "general standards of decency." *See also Bullfrog Films v. Wick*, 646 F.Supp. 492, 505 (C.D. Cal. 1986) (finding USIA regulation impermissibly vague because "[h]ow is one to determine what is 'misrepresentative' of an

open, diverse and pluralistic society as is the United States"), *aff'd*, 847 F.2d 502 (9th Cir. 1988).

There is no question that persons "of common intelligence must necessarily guess at [the] meaning and differ as to [the] application" of § 954(d). *Connally*, 269 U.S. at 390, 46 S.Ct. at 127. Further, this provision clearly gives rise to each of the three evils identified in *Grayned*: (1) it creates a trap for the unwary applicant who may engage in expression she or he believes to comport with the standard, only to learn upon receiving notice that her or his grant has been withdrawn or a new application denied because she or he has offended someone's subjective understanding of the standard; (2) panelists, the Council, and the Chairperson are given no guidance in administering the standard; each apparently is expected to draw on her or his own personal views of decency or some ephemeral "general American standard of decency;" and (3) it necessarily causes the imposition of self-censorship wider than the line drawn by the statute because the line is, in effect, imperceptible. *See* 408 U.S. at 108-09, 92 S.Ct. at 2299.

As the decency provision fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion, it cannot be given effect consistent with the Fifth Amendment's due process requirement.

D. *First Amendment*

Plaintiffs also contend that the "decency" clause violates the First Amendment on two grounds. First, they contend that the decency clause constitutes an unconstitutional condition. They argue that because the NEA reviews all of an applicant's prior work in determining whether the application meets that stan-

dard. Alternatively, plaintiffs contend that, even if the reach of the decency clause is limited to work funded by the NEA, public funding of the arts (like public funding in the context of a university or the press) requires government neutrality, a requirement violated by the decency clause.

The unconstitutional condition theory is easily disposed of for two reasons. First, this theory rests on allegations that NEA appraisal of funding applications includes an evaluation of each applicant's entire body of work—whether NEA-funded or otherwise. However, this is a facial challenge to the statute. On such a challenge, it is inappropriate to consider the manner in which the agency has interpreted and applied the statute.

Second, in support of this claim, plaintiffs have submitted evidence that the NEA grant-making process includes review of non-NEA funded works in more than one category within the NEA's Theater Program. In response, defendants have adduced evidence that an applicant's past work is considered only in a few limited categories, and even then review is confined to consideration of the titles and dates of the performances. As defendants' evidence creates a material factual dispute, resolution of this issue on summary judgment would be foreclosed even if agency practice were a permissible consideration in this context.[18]

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[18] An argument can be made that the decency clause constitutes a facially unconstitutional condition with respect to groups, agencies and non-profit organizations that receive NEA funding. Because the NEA is permitted to fund only up to 50% of the total cost of any program or project conducted by a group, agency or non-profit organization, 20 U.S.C. § 954(e) (groups), § 954(p)(3) (agencies and non-profit organizations),

1. First Amendment interest in artistic expression funded by the government

As an alternative theory of First Amendment violation, plaintiffs contend that public subsidization of art, like public funding of the press and university activities, demands government neutrality. In effect, plaintiffs ask the court to recognize a protected First Amendment interest in artistic expression funded by the government.

Plaintiffs point out that the Court in *Rust v. Sullivan* cautioned that "funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is [not] invariably sufficient to justify government control over the content of expression." 111 S.Ct. at 1776. The Court cited universities and public fora as two settings in which First Amendment values demand government neutrality notwithstanding that in both contexts the government is merely declining to support speech rather than prohibiting it altogether. *Id.* The Court observed that its prior decisions recognized that

> the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of funds is

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any statutory content control over an NEA-supported program or project necessarily imposes restrictions over a substantial proportion of non-NEA-funded expression. However, as the NAAO have not raised this argument, the court does not address or resolve it.

> restricted by the vagueness and overbreadth doctrines of the First Amendment.

Id. (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967)).[19]

In *Keyishian*, a case widely-cited in support of academic freedom, the Court observed that

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The Nation's future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian, 385 U.S. at 603, 87 S.Ct. at 683.

Artistic expression, no less than academic speech or journalism, is at the core of a democratic society's cultural and political vitality. Congress recognized as much in establishing the NEA. For example, the Senate Report accompanying the NEA's creation devoted an entire section to "Freedom of Expression." It stated, *inter alia*, that:

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[19] In addition, other recent cases suggest that the press is also an arena in which content controls on subsidies are prohibited. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 1443-46, 113 L.Ed.2d 494 (1991) (content-based subsidization of the press through tax exemptions constitutes First Amendment injury); *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221, 229, 107 S.Ct. 1722, 1727, 95 L.Ed.2d 209 (1987) (tax exemption based on content of a publication constitutes First Amendment injury).

> It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression . . . Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age.
>
> Therefore, the *committee affirms that the intent of this act should be the encouragement of free inquiry and expression.* The committee wishes to make clear that conformity for its own sake is not to be encouraged, and that no undue preference should be given to any particular style or school of thought or expression . . . The standard should be artistic and humanistic excellence.

S.Rep. No. 300, 89th Cong. 1st Sess. 3-4 (1965) (emphasis added).

In addition, the significance of the arts as a "traditional sphere of free expression . . . fundamental to the functioning of our society," *Rust*, 111 S.Ct. at 1776, is confirmed by the legislative "Declaration of findings and purposes" that is a part of the NEA's authorizing statute. There, Congress stated, in part, that:

> (3) An advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.

> (4) Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located the masters of their technology and not its unthinking servants.
>
> (6) The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.
>
> (7) The practice of art and the study of the humanities require constant dedication and devotion. While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.
>
> (9) Americans should receive in school, background and preparation in the arts and humanities to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression.
>
> (10) It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.

20 U.S.C. § 951.

It is clear from these legislative findings[20] that artistic expression serves many of the same values central to a democratic society and underlying the First Amendment as does scholarly expression in other fields. In addition, as reported by *amicus curiae* College Art Association ("CAA"),[21] NEA grants are often made to artists and museums in the university context. For example, the CAA itself has received NEA grants to support its annual conference in past years. Additionally, many of its individual and institutional members have received NEA grants. CAA reports that government support has been critical to the health and well-being of the arts and humanities in American universities.

The close relationship between academic freedom and artistic expression was recently set forth in a statement by participants in a conference sponsored by the American Association of University Professors, the American Council on Education, the Association of Governing Boards of Universities and Colleges, and the Wolf Trap Foundation:

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[20] These findings were reaffirmed by Congress through the revision and republication of this section as part of the 1990 Amendments. *See* Pub. L. No. 101-512, § 101, 104 Stats. 1961-62.

[21] The College Art Association is a nationwide, non-profit organization whose members include 2,000 institutions of higher education and museums, in addition to 11,600 individual artists, art historians and museum professionals. It was founded in 1911 both as a learned society and professional organization dedicated to promoting the highest standards of scholarship and teaching in the history and criticism of the visual arts and to foster the highest levels of technical skill in teaching and practices of art.

> We believe that "essential as freedom is for the relation and judgment of facts, it is even more indispensable to the imagination." . . . Faculty and students engaged in the creation and presentation of works of the visual and the performing arts are engaged in pursuing the mission of the university as much as are those who write, teach, and study in other academic disciplines. Works of the visual and performing arts are important both in their own right and because they can enhance our experience and understanding of social institutions and the human condition. Artistic expression in the classroom, studio and workshop therefore merits the same assurance of academic freedom that is accorded to other scholarly and teaching activities.

Academic Freedom and Artistic Expression, Academe at 13 (July-Aug. 1990).

In response to plaintiffs' position, defendants note that unlike public fora, NEA funding is a limited resource, and argue that the NEA cannot parcel out its limited budget on a purely content-neutral, first-come-first- served basis as governments must do in allocating use of a public forum. Instead, they argue, the agency must select a small percentage of the many applicants based on its subjective judgment of which of the exceptionally talented artists would best promote the statute's objectives.

Defendants misapprehend the substance of plaintiffs' challenge. Plaintiffs do not argue that arts funding is analogous to a public forum or that NEA funds must be allocated on a first-come, first-served basis. Rather, plaintiffs analogize funding for the arts to funding of public universities. In both set-

tings, limited public funds are allocated to support expressive activities, and some content-based decisions are unavoidable. Nonetheless, this fact does not permit the government to impose whatever restrictions it pleases on speech in a public university, nor should it provide such license in the arts funding context. Hiring and promotion decisions based on professional evaluations of academic merit are permissible in a public university setting, but decisions based on vague criteria or intended to suppress unpopular expression are not. *See Dube v. State Univ. of New York*, 900 F.2d 587, 598 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211, 111 S.Ct. 2814, 115 L.Ed.2d 986 (1991); *Levin v. Harleston*, 770 F.Supp. 895, 921 (S.D.N.Y. 1991); *cf. Keyishian*, 385 U.S. at 605-606, 87 S.Ct. at 685. Analogously, professional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of "decency" are not. *Cf. Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575-77 (9th Cir. 1984) (city may dedicate public forum to certain categories of expression but may not deny access to performers based on their political views or unorthodox manner of expression), *cert. denied*, 471 U.S. 1054, 105 S.Ct. 2115, 85 L.Ed.2d 480 (1985).

Thus, the fact that the exercise of professional judgment is inescapable in arts funding does not mean that the government has free rein to impose whatever content restrictions it chooses, just as the fact that academic judgment is inescapable in the university does not free public universities of First Amendment scrutiny. The right of artists to challenge conventional wisdom and values is a cornerstone of artistic and academic freedom, no less than the rights of scientists funded by the National Institutes of Health.

See Board of Trustees of Leland Stanford Jr. Univ. v. Sullivan, 773 F.Supp. 472, 478 (D.D.C. 1991). Therefore, the court holds that government funding of the arts is subject to the constraints of the First Amendment.

2. First Amendment injury

Having concluded that public funding of art is entitled to First Amendment protection, the resolution of plaintiffs' challenge is straightforward.

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). A statute that suppresses a substantial amount of constitutionally protected expression must be refused effect unless it is subject to a construction that narrows its reach only to unprotected speech. *See Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575-76, 107 S.Ct. 2568, 2573, 96 L.Ed.2d 500 (1987).

The decency clause seeks to suppress speech that is offensive to some in society. It is well-established that

> the fact that given speech is thought by many to be highly offensive, either because it espouses political, religious, racial or other doctrines which to many are most abhorrent, [] or because of its use of "indecent" words,[] does not, absent a

> showing of likely and imminent antisocial conduct arising from such speech, constitute a ground for abridging speech.

M.B. Nimmer, *Nimmer on Freedom of Speech* § 2.05[B][1] at 2-30 (1991) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)).

The decency clause clearly reaches a substantial amount of protected speech. In *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989), the Supreme Court held that "expression which is indecent but not obscene is protected by the First Amendment. . . ." *See also FCC v. Pacifica Found.*, 438 U.S. 726, 740, 98 S.Ct. 3026, 3035, 57 L.Ed.2d 1073 (1978) ("prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality"). The statute seeks to confine the NEA's funding approval only to what is "decent." Conversely, it seeks to dissuade the NEA from funding what is "indecent" When a statute directed at speech is overbroad, as is the decency clause, it gives rise to the hazard that "a substantial loss or impairment of freedoms of expression will occur. . . ." *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965).

The decency clause sweeps within its ambit speech and artistic expression which is protected by the First Amendment. The court, therefore, holds that the decency clause, on its face, violates the First Amendment for overbreadth and cannot be given effect.

CONCLUSION

For all of the foregoing reasons, the court denies defendants' motion for judgment on the pleadings, except with respect to plaintiffs' Second Claim. Further, the court grants plaintiffs' motion for summary judgment on the Sixth Claim, on the grounds that the "decency" clause of 20 U.S.C. § 954(d)(1), on its face, is void for vagueness under the Fifth Amendment and is overbroad under the First Amendment. A separate judgment shall be entered on the Sixth Claim, consistent herewith.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-56028

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES;
TIM MILLER; NATIONAL ASSOCIATION OF
ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; ANNE-IMELDA
RADICE,* IN HER OFFICIAL CAPACITY
AS CHAIRPERSON OF THE NATIONAL ENDOWMENT
FOR THE ARTS, DEFENDANTS-APPELLANTS

No. 92-56387

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES;
TIM MILLER; NATIONAL ASSOCIATION OF
ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; ANNE-IMELDA
RADICE, IN HER OFFICIAL CAPACITY
AS CHAIRPERSON OF THE NATIONAL ENDOWMENT
FOR THE ARTS, DEFENDANTS-APPELLANTS

No. 92-55089

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES;
TIM MILLER; NATIONAL ASSOCIATION OF
ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; ANNE-IMELDA
RADICE, IN HER OFFICIAL CAPACITY
AS CHAIRPERSON OF THE NATIONAL ENDOWMENT
FOR THE ARTS, DEFENDANTS-APPELLANTS

May 1, 1997

ORDER

Before: BROWNING, FERGUSON, and KLEINFELD, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

O'SCANNLAIN, Circuit Judge, joined by KOZINSKI and KLEINFELD, Circuit Judges,- dissenting from order rejecting suggestion for rehearing en banc:

This case should be reheard en banc because our three judge panel split decision conflicts with two other circuits, is wrong on the merits, and turns the First Amendment on its head.

The plaintiffs are artists, who, along with 5,164 others, applied for a Visual Arts Fellowship from the National Endowment for the Arts ("NEA") in 1994. The plaintiffs weren't awarded fellowships (although 88 others were) so they sued, claiming that their First Amendment rights had been violated because Congress required the NEA, in addition to judging applications by "artistic excellence" and "artistic merit," to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d). In ruling that the "decency and respect" provision offends the First Amendment, our divided court commits three grave errors.

First, the panel majority gave the NEA statute an implausible construction. According to the panel, rather than merely take "decency and respect" into consideration, as the statute says, the NEA must use "decency and respect" as the decisive criterion for awarding grants. *Finley v. NEA*, 100 F.3d 671, 680 (9th Cir.1996). There simply is no warrant for manufacturing such an imagined conflict with the First Amendment.[1]

---

[1] The panel creates more than an imagined conflict with two of our sister circuits. See *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir.1985); *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir.). *cert. denied*, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976).

The panel's second error aggravates the first by applying the "void for vagueness" doctrine where it does not belong, and without regard for the purposes underlying it. A vague law is not as dangerous when the government is handing out a prize instead of meting out a punishment. The "decency and respect" provision neither "trap[s] the innocent," nor "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108- 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

As the panel majority would have it, however, simply because the statute is vague and has something to do with speech, it must offend the First Amendment. See *Finley*, 100 F.3d at 679. In my view, this is wrong: a law must actually threaten or chill protected speech before we strike it down.

How does the "decency and respect" provision inhibit First Amendment rights? Tellingly, the majority doesn't say. It merely points to the heightened need for specific standards when a statute's provisions "touch upon speech." *Finley*, 100 F.3d at 679. The need "may be even greater when a statute subsidizes speech and the risk that the provision on its face will inhibit speech remains." *Id.* This confusing (and doubtful) statement utterly fails to explain how First Amendment liberties are threatened when the government awards a prize.

The majority might well have thought that a government award for certain types of art will subtly coerce artists to produce art of that type, thereby

chilling creation of "other" art. Or it could have thought that artists cannot be denied a government benefit because they express themselves in a particular way, *i.e.*, indecently. Neither theory fits here, however.

If the first argument were true, the government could never hand out awards for any specific type of art without chilling other artistic expression. Under such reasoning, it would be unconstitutional for the government to award a prize for the best performance of Mozart's "Magic Flute" because it might coerce opera companies across the nation to perform that opera in preference to another.

The second argument is equally problematic. The Supreme Court has repeatedly instructed that the First Amendment is not violated when Congress subsidizes some speech, but not all speech. *Rust v. Sullivan*, 500 U.S. 173, 193, 111 S.Ct. 1759, 1772, 114 L.Ed.2d 233 (1991); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549, 103 S.Ct. 1997, 2002-03, 76 L.Ed.2d 129 (1983); *Harris v. McRae*, 448 U.S. 297, 317 n. 19, 100 S.Ct. 2671, 2688 n. 19, 65 L.Ed.2d 784 (1980); *Maher v. Roe*, 432 U.S. 464, 475, 97 S.Ct. 2376, 2383, 53 L.Ed.2d 484 (1977); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Moreover, *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), cannot be stretched to cover this case: the government benefit here is given out to a select few artists on the basis of the content of their expression. Rosenberger should not be read to apply to prizes.

The panel's third error comes in its alternate holding: that the statute is impermissible because it contains content-based and viewpoint-based restrictions. The panel applies standard First Amendment principles to a situation that the First Amendment doesn't cover. When the government awards a special prize to a select few artists, it necessarily will distinguish between the artists on the basis of the content of their speech. Indeed, content-based distinctions are the whole reason for NEA grants. Considerations of viewpoint are also a necessary element of the decision of whether art is "excellent" or meritorious. What art critic would contend that the subject matter of a work of art is irrelevant to deciding whether it is "excellent"? In any event, the terms "artistic excellence" and "artistic merit" are vague enough to allow an NEA official to consider an artist's viewpoint, but that doesn't bother the majority. It shouldn't, because the First Amendment does not prohibit that. Neither does the Amendment prohibit "taking into consideration general standards of decency and respect" when awarding a prize.

The majority's opinion does far more than give a hostile construction to a Congressional enactment in order to create a conflict with other circuits and Supreme Court precedent, and overturn a law. It sows the seeds of an imprudent First Amendment jurisprudence which will entangle and choke Congress' ability to control public funds used to sponsor any sort of free expression.

Because this case should have been reheard en banc, I respectfully dissent from the court's order not to do so.

APPENDIX D

STATUTES INVOLVED

UNITED STATES CODE
TITLE 20—EDUCATION
CHAPTER 26—SUPPORT AND SCHOLARSHIP IN HUMANITIES AND ARTS; MUSEUM SERVICES
SUBCHAPTER I—NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

§ 951. Declaration of findings and purposes

The Congress finds and declares the following:

(1) The arts and the humanities belong to all the people of the United States.

(2) The encouragement and support of national progress and scholarship in the humanities and the arts, while primarily a matter for private and local initiative, are also appropriate matters of concern to the Federal Government.

(3) An advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.

(4) Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants.

(5) It is necessary and appropriate for the Federal Government to complement, assist, and add to programs for the advancement of the

humanities and the arts by local, State, regional, and private agencies and their organizations. In doing so, the Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.

(6) The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.

(7) The practice of art and the study of the humanities require constant dedication and devotion. While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.

(8) The world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit.

(9) Americans should receive in school, background and preparation in the arts and humanities to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of

excellence that comprises our cultural heritage, and artistic and scholarly expression.

(10) It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.

(11) To fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people, the Federal Government must transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art.

(12) In order to implement these findings and purposes, it is desirable to establish a National Foundation on the Arts and the Humanities.

§ 952. Definitions

As used in this chapter—

* * * * *

(b) The term "the arts" includes, but is not limited to, music (instrumental and vocal), dance, drama, folk art, creative writing, architecture and allied fields, painting, sculpture, photography, graphic and craft arts, industrial design, costume and fashion design, motion pictures, television, radio, film, video, tape and sound recording, the arts related to the presentation, performance, execution, and exhibition of such major art forms, all those traditional arts practiced by the diverse peoples of this country, and the study and application of the arts to the human environment.

(c) The term "production" means plays (with or without music), ballet, dance and choral performances, concerts, recitals, operas, exhibitions, readings, motion pictures, television, radio, film, video, and tape and sound recordings, and any other activities involving the execution or rendition of the arts and meeting such standards as may be approved by the National Endowment for the Arts established by section 954 of this title.

(d) The term "project" means programs organized to carry out the purposes of this subchapter, including programs to foster American artistic creativity, to commission works of art, to create opportunities for individuals to develop artistic talents when carried on as a part of a program otherwise included in this definition, and to develop and enhance the widest public knowledge and understanding of the arts, and includes, where appropriate, rental or purchase of facilities, purchase or rental of land, and acquisition of equipment. * * * * *

(e) The term "group" includes any State or other public agency, and any nonprofit society, institution, organization, association, museum, or establishment in the United States, whether or not incorporated.

(f) The term "workshop" means an activity the primary purpose of which is to encourage the artistic development or enjoyment of amateur, student, or other nonprofessional participants, or to promote scholarship and teaching among the participants.

* * * * *

§ 953. National Foundation on the Arts and the Humanities

(a) Establishment; composition

There is established a National Foundation on the Arts and the Humanities (hereinafter referred to as the "Foundation"), which shall be composed of a National Endowment for the Arts, a National Endowment for the Humanities, a Federal Council on the Arts and the Humanities, and an Institute of Museum Services.

(b) Purpose

The purpose of the Foundation shall be to develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States, and for institutions which preserve the cultural heritage of the United States pursuant to this subchapter.

* * * * *

§ 954. National Endowment for the Arts

(a) Establishment

There is established within the Foundation a National Endowment for the Arts.

(b) Chairperson of the Endowment; term of office; vacancies

(1) The Endowment shall be headed by a chairperson, to be known as the Chairperson of the National Endowment for the Arts, who shall be appointed by the President, by and with the advice and consent of the Senate.

* * * * *

(c) Program of contracts, grants-in-aid, or loans to groups and individuals for projects and productions; traditionally underrepresented recipients of financial assistance

The Chairperson, with the advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts, for the purpose of enabling them to provide or support—

(1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;

(2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons;

(3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;

(4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;

(5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts;

(6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;

(7) programs for the arts at the local level;

(8) projects that enhance managerial and organizational skills and capabilities;

(9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and

(10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

* * * * *

In selecting individuals and groups of exceptional talent as recipients of financial assistance to be provided under this subsection, the Chairperson shall give particular regard to artists and artistic groups that have traditionally been underrepresented.

(d) Application for payment; regulations and procedures

No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—

(1) artistic excellence and artistic merit are the criteria by which applications are judged,

taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and

(2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment for the Arts.

The disapproval or approval of an application by the Chairperson shall not be construed to mean, and shall not be considered as evidence that, the project, production, workshop, or program for which the applicant requested financial assistance is or is not obscene.

* * * * *

§ 959. Administrative provisions

(a) General authority of Chairpersons

In addition to any authorities vested in them by other provisions of this subchapter, the Chairperson of the National Endowment for the Arts and the Chairperson of the National Endowment for the Humanities, in carrying out their respective functions, shall each have authority—

(1) to prescribe such regulations as the Chairperson deems necessary governing the manner in which the Chairperson's functions shall be carried out;

* * * * *

(4) to utilize experts and consultants, including panels of experts, who may be employed as authorized by section 3109 of title 5;

* * * * *

(c) Advisory panels; membership; procedures

The Chairperson of the National Endowment for the Arts shall utilize advisory panels to review applications, and to make recommendations to the National Council on the Arts in all cases except cases in which the Chairperson exercises authority delegated under section 955(f) of this title. When reviewing applications, such panels shall recommend applications for projects, productions, and workshops solely on the basis of artistic excellence and artistic merit. The Chairperson shall issue regulations and establish procedures—

(1) to ensure that all panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view;

(2) to ensure that all panels include representation of lay individuals who are knowledgeable about the arts but who are not engaged in the arts as a profession and are not members of either artists' organizations or arts organizations;

(3) to ensure that, when feasible, the procedures used by panels to carry out their responsibilities are standardized;

(4) to require panels—

(A) to create written records summarizing—

(i) all meetings and discussions of such panel; and

(ii) the recommendations made by such panel to the Council; and

(B) to make such records available to the public in a manner that protects the privacy of individual applicants and panel members;

(5) to require, when necessary and feasible, the use of site visitations to view the work of the applicant and deliver a written report on the work being reviewed, in order to assist panelists in making their recommendations; and

(6) to require that the membership of each panel change substantially from year to year and to provide that each individual is ineligible to serve on a panel for more than 3 consecutive years.

* * * * *

(2) No. 97-371

Supreme Court, U.S.
FILED
OCT 31 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,

Petitioners,

—v.—

KAREN FINLEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether 20 U.S.C. §954(d)(1), which imposes the criteria of "general standards of decency and respect for the diverse beliefs and values of the American public" on a National Endowment for the Arts funding program designed to support a diverse range of private expression, is unconstitutionally viewpoint-based and vague.

RULE 29.6 STATEMENT

This brief is filed on behalf of four individuals and one nonprofit corporation, the National Association of Artists' Organizations (NAAO). NAAO does not have any parent or subsidiary companies.

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STATEMENT OF THE CASE

Congress created the National Endowments for the Arts and the Humanities (NEA) in 1965, in order "to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent." 20 U.S.C. §951(7). The overriding standard for arts grants was to be "artistic and humanistic excellence." S. Rep. No. 300, 89th Cong., 1st Sess. 4 (June 8, 1965). The Senate Report devoted an entire section to "Freedom of Expression," and noted:

> It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression . . . . Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age.
>
> Therefore, the committee affirms that the intent of this act should be the encouragement of free inquiry and expression . . . . [C]onforming for its own sake is not to be encouraged, and . . . no undue preference should be given to any particular style of thought or expression.

Id. at 3-4.

For its first 24 years of existence, the NEA was governed by these standards of free expression, with statutory grant criteria that focused on artistic excellence. "Peer panels" of experts in various disciplines reviewed applications and made recommendations for grants, providing substantial insulation from the political pressures that might otherwise distort the decisionmaking process. *See* Pet.App. 4a.

In 1989, however, in response to controversial photographs by the artists Robert Mapplethorpe and Andrès Serrano that were displayed with the support of NEA grants, Congress for the first time imposed ideological restrictions on the agency that were unrelated to artistic merit. Section 304(a) of Pub. L. No. 101-221, 103 Stat. 701, 741 (1989), provided that no funds appropriated for the NEA or the NEH

> may be used to promote, disseminate, or produce materials which in the judgment of the [NEA or NEH] may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, and sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.

This "obscenity" restriction, as implemented by the NEA, was held unconstitutional in *Bella Lewitzsky Dance Foundation v. Frohnmayer*, 754 F.Supp. 774 (C.D.Cal. 1991), and the government did not appeal.

NEA grants continued to be the subject of political controversy, and in June 1990, the NEA Chairperson, under political pressure, decided to reject unanimous recommendations by a peer review panel to award Solo Performance Arts Fellowships to Karen Finley, Holly Hughes, Tim Miller, and John Fleck. This lawsuit followed in September 1990, alleging that the Chairperson had denied the four fellowships not on artistic merit grounds, but because of the controversial political ideas contained in the plaintiffs' work, which addressed such issues as homosexuality, AIDS, and violence against women. Plaintiffs claimed that these ideologically motivated grant denials violated their First Amendment rights as well as the NEA's governing statute.

Two months after the suit was filed, and in the wake of another legislative battle over arts funding, Congress amended the NEA statute to insert the directive at issue in this petition and struck down by the courts below. It requires, for the first time, that in judging arts applications, the NEA must "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. §954(d)(1). Representative Henry, the author of this "decency and respect" amendment, clearly explained its purpose and intended effect:

> This substitute includes language in the heart of the grantmaking process. We add to the criteria of artistic excellence and merit a shell, a screen, a viewpoint that must constantly be taken into account.

136 Cong.Rec. H9417 (Oct. 11, 1990). The amendment does not define "decency," "respect," or the "beliefs and values of the American public."[1]

In contrast to the previous year's "obscenity" limitation, the "decency and respect" provision did not merely restrict artwork specifically funded by the NEA, but effectively imposed a content and viewpoint-based condition on an applicant's whole lifetime of artistic production. This was because grants were based on "past performance evaluation

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[1] Congress rejected two alternative bills that would have incorporated the Federal Communications Commission's definition of "indecent." *See* 136 Cong.Rec. H9442 (Oct. 11, 1990); 136 Cong.Rec. H9674 (Oct. 15, 1990)(Rohrabacher and Regula amendments incorporating FCC definition); 136 Cong.Rec. H9448-49 (rejecting Rohrabacher amendment); 136 Cong.Rec. H9683-84 (replacing Regula amendment with "decency and respect" provision).

and other pertinent information";[2] that is, on an "applicant's entire body of work."[3]

In December 1990, a month after the passage of §954(d)(1), the National Council on the Arts met and discussed how the "decency and respect" language would be enforced.[4] The Council resolved that peer review panels would apply the new standards "as a matter of course because each panelist brought to the table their community's standards of decency and this would become part of the deliberative process."[5] In keeping with this resolution, NEA officials instructed all peer review panel members to apply their own standards of decency in judging applications: "the basic instruction that the panels receive [is] that by virtue of your backgrounds and by virtue of your diversity you represent the general standards of decency . . . . You bring your general standards of decency from your communities, from you[r] backgrounds, from your ethnic backgrounds, and that is how we deal with it."[6] Both NEA Chairpersons responsible for implementing the provision before it was struck

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[2] *Department of the Interior and Related Agencies Appropriations for 1992*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 232 (Feb. 21, 1991)(testimony of NEA Chairperson John Frohnmayer).

[3] Fiscal Year 1992 Application Guidelines for NEA Theater Grants, p.65. This was a part of the Supplemental Excerpts of Record filed with the court of appeals (hereinafter "SER"), at 90.

[4] The Council is a 26-member body that advises the Chairperson on all grant recommendations. *See* 20 U.S.C. §955. The Chairperson makes the ultimate decision. 20 U.S.C. §954(c).

[5] Minutes of December 1990 Retreat of National Council on the Arts (March 18, 1991), SER at 23.

[6] Transcript of December 1990 Retreat of National Council on the Arts, Statement of NEA General Counsel Julianne Davis, SER at 65.

down also testified that they personally would review grant applications to ensure that the applications conformed to the "decency" and "respect" standard.[7] In implementing §954(d)(1), therefore, the NEA declined to provide any substantive clarification of the statutory terms, and left the interpretation and enforcement of the "decency and respect" requirement to the individual judgments of hundreds of peer panel members, 26 National Council members, and the Chairperson.

In March 1991, plaintiffs amended their suit to challenge the constitutionality of §954(d)(1). They were joined by the National Association of Artists' Organizations, which sued on its own behalf and as representative of its hundreds of member artists and arts institutions, which regularly apply for and receive NEA grants. The amended complaint alleged that the "decency and respect" requirement was both unconstitutionally viewpoint-based and void for vagueness, thereby inviting arbitrary and discriminatory decision-making.

In late 1991, the parties filed cross-motions: the government for judgment on the pleadings, and the plaintiffs for summary judgment as to the facial unconstitutionality of the"decency and respect" law. On June 9, 1992, the federal district court denied the government's motion and granted the plaintiffs', ruling that 20 U.S.C. §954(d)(1) was fatally vague and overbroad, in violation of the First and Fifth

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[7] *Department of the Interior and Related Agencies Appropriations for 1992*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 234 (Feb. 21, 1991)(testimony of NEA Chairperson John Frohnmayer); *Department of the Interior and Related Agencies Appropriations for 1993*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 2d Sess. 613-14 (May 5, 1992)(testimony of NEA Chairperson Anne-Imelda Radice).

Amendments. Pet.App. 69a-88a. The parties ultimately settled the claims of the four individual plaintiffs that their Performance Arts Fellowships had been unlawfully denied.[8] The government appealed the judgment striking down the "decency and respect" law.

A panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling on November 5, 1996. Relying on both the First and Fifth Amendment strands of vagueness doctrine, the panel held that "decency and respect" provides "no 'ascertainable standard for inclusion and exclusion,'" so that persons of "common intelligence must necessarily guess at [the] meaning'" of the statute. Pet.App. 17a (quoting *Smith v. Goguen*, 415 U.S. 566, 578 (1974), and *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). The Court explained that "[t]he individual members of a pluralistic society, and particularly our own, have a great variety of beliefs and values, largely unascertainable." Pet.App. 18a. The "decency and respect" clause thus "gives rise to the danger of arbitrary and discriminatory application." *Id.* The panel majority rejected the argument of Judge Kleinfeld in dissent that government benefit programs are exempt from constitutional vagueness scrutiny if the benefits offered are "not generally available." As in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. __, __, 115 S.Ct. 2510, 2519-20 (1995), the panel said, "the scarcity of a government benefit does not render it immune from constitutional limitations." Pet. App. 5a, n.2.[9]

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[8] The NEA agreed to pay plaintiffs the amounts of the vetoed grants, plus damages for statutory violations, and attorneys' fees. Stipulation and Settlement Agreement, filed June 9, 1993.

[9] The court of appeals also agreed with the district court that the "decency" and "respect" mandates could not be read as simply advisory, or (continued...)

The court of appeals also found that the "decency and respect" requirement was unconstitutionally viewpoint-based. Unlike the subsidy program at issue in *Rust v. Sullivan*, 500 U.S. 173 (1991), here the government was not seeking to convey its own message but to promote a diversity of private artistic styles and ideas in "'a traditional sphere of free expression,'" much like a public university. Pet.App. 21a (quoting *Rust*, 500 U.S. at 200). Because the arts, "no less than the university, are 'at the core of a democratic society's cultural and political vitality,'" a funding restriction aimed at ideas considered offensive or disagreeable was impermissibly viewpoint-based. Pet.App. 22a-24a (quoting district court opinion, 795 F.Supp. at 1473).[10]

The government's petition for rehearing was denied on May 1, 1997. Pet.App. 91a. Judges O'Scannlain and Kozinski now joined Judge Kleinfeld in dissent. *Id.* at 92a. They argued that the void for vagueness doctrine should not apply when "the government is handing out a prize instead of meting out a punishment," *id.* at 93a; and that, similarly, "the First Amendment doesn't cover" situations in which the government "awards a special prize to a select few artists." *Id.*

The government timely filed a petition for a writ of *certiorari*.

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[9] (...continued)
as not fundamentally changing the decisionmaking standard. Pet.App. 7a-12a.

[10] The court of appeals did not reach the plaintiffs' additional argument that §954(d)(1) created an unconstitutional condition by imposing a "decency" and "respect" requirement on the lifetime work of artists who might seek NEA grants.

REASONS FOR DENYING THE WRIT

The NEA's petition argues, in essence, that *certiorari* should be granted because the court of appeals invalidated a federal statute. Unable to point to a single decision that conflicts with the court of appeals' ruling in this case, the NEA instead argues that the decision below raises an important issue, and is wrong on the merits. But this Court's role is not to correct error,[11] and none of the reasons the NEA identifies for granting *certiorari* merits this Court's attention.

The NEA argues first that the court of appeals misinterpreted the statutory provision at issue. But the NEA's own proffered interpretation of the statute does not cure its constitutional infirmities. In fact, it makes them worse: in the court of appeals, the NEA characterized the statute as "indeterminate" and offering "no way to predict" how it would be implemented. That is the very definition of unconstitutional vagueness.

Second, the NEA argues that this Court's decision in *Rust v. Sullivan*, 500 U.S. 173, permits ideological discrimination in an arts subsidy program. But the NEA neglects to mention that the Court has limited *Rust* to situations where the government itself "is the speaker or when it enlists private entities to convey its own message." *Rosenberger*, 115 S.Ct. at 2518. The NEA conceded below that the awarding of NEA funds is "not the government's own speech," and does "not constitute government approval of a particular message or point of view." NEA Supp. C.A. Br. at 3-4. Those admissions render *Rust* inapplicable, and bring this case within the four corners of *Rosenberger*, which prohibits

[11] Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi (1949).

viewpoint-based discrimination in the allocation of subsidies to private speech.

Third, the NEA maintains that vagueness standards should not apply to statutes governing the allocation of subsidies to speech. But this claim, supported by no precedent, would give government officials unbridled discretion to use purse strings to control private speech. On the government's view, the Post Office could grant second class mailing privileges to any magazine it deemed "appropriate," leaving unfettered discretion to the Postmaster General. Because the concerns raised by unlimited discretion over speech apply to both subsidies and penalties, the court of appeals properly subjected the "decency and respect" provision to vagueness scrutiny.

Thus, apart from the fact that the court of appeals has invalidated a federal statute, the NEA offers no reason for this Court to grant *certiorari*. A decision to declare a federal statute unconstitutional is no doubt important, but where, as here, the decision creates no conflict and is fully consistent with this Court's established jurisprudence, *certiorari* should be denied.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS

As the NEA's petition concedes, the court of appeals' decision does not conflict with that of any court from any other circuit. Indeed, the NEA does not even mention a decision from another court of appeals until the last two pages of its petition, and then contends merely that the decision below is "in tension" with two other decisions. Pet. 27. Even the asserted "tension" is illusory. The Court should therefore deny *certiorari* until and unless a genuine conflict emerges.

The court of appeals' decision is not the first time courts have scrutinized the validity of criteria like "decency" and "respect" for government subsidies to speech, and its result is fully consistent with prior precedents. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 549-50, 553 (1975), this Court struck down a municipal policy restricting access to a municipal auditorium -- a public subsidy -- to works that were "clean and healthful and culturally uplifting" because those criteria gave city officials "unbridled discretion." In *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151, 157-58 (1946), the Court reasoned that if a postal statute gave the Postmaster General the power to deny second-class mailing status -- also a valuable subsidy -- based on his determination that a magazine was "indecent," "morally improper" and "not for the public welfare and the public good," the statute would be unconstitutional. And most recently, in *Rosenberger*, the Court held that a university's refusal to subsidize student religious magazines was impermissibly viewpoint-based. 115 S.Ct. at 2517. If these standards for government subsidies to speech were improper, so too are "general standards of decency and respect for the diverse beliefs and values of the American public."[12]

[12] When lower courts have reached similar results in the past, the United States has declined to seek *certiorari*. In *Bullfrog Films v. Wick*, 847 F.2d 502, 512-14 (9th Cir. 1988), for example, the court of appeals invalidated USIA criteria for allocating benefits to documentary films as impermissibly vague and content-based, and the government chose not to seek *certiorari*. In *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035-40 (D.C.Cir. 1980), the D.C. Circuit held unconstitutionally vague the Treasury Department's criteria for allocating nonprofit tax status to educational groups, and the government again declined to seek *certiorari*. The court of appeals' decision in this case applies the same principles to government subsidies, and is similarly unworthy of *certiorari*.

(continued...)

The two cases the NEA portrays as "in tension" with the court of appeals' decision are entirely distinguishable. Neither case involved a vagueness or viewpoint-based challenge to statutory criteria for an arts funding program. *Advocates for the Arts v. Thomson*, 532 F.2d 792, 795-96 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976), held merely that courts should not second-guess a government official's judgment that a funding application lacked *aesthetic* merit. This case does not question the authority of NEA officials to make aesthetic judgments, but questions the authority of Congress to superimpose extrinsic viewpoint-based and vague considerations on the allocation of subsidies to private speech.[13]

Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985), did not involve a funding program at all. It upheld a college's decision about where to display a particular work of art, which it treated as akin to an act of "government speech." The college's concern was that what it displayed in the main lobby of its principal building would be deemed to express an official message. *Id.* at 630. But as this Court held in *Rosenberger*, the government's latitude to control the mes-

[12] (...continued)

Where government defendants have sought review of analogous decisions, this Court has denied *certiorari*. *See Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)(holding unconstitutionally vague a "family entertainment" standard for access to a municipal amphitheater).

[13] The court in *Advocates for the Arts* stated that the state's decision would have been unconstitutional if based on "such extrinsic considerations as applicants' political views, associations, or activities." *Id.* at 798 n.8. Since the "decency and respect" clause mandates just such viewpoint-based consideration of "extrinsic" factors, it would be unconstitutional under *Advocates for the Arts*.

sages it expresses does not extend to situations where, as here, it has created a funding program not to express an official *governmental* message, but to support a diverse range of *private* expressions.

II. *CERTIORARI* IS NOT APPROPRIATE TO RESOLVE THE ISSUE OF STATUTORY CONSTRUCTION PRESENTED BY THE GOVERNMENT BECAUSE, EVEN UNDER THE GOVERNMENT'S INTERPRETATION, THE "DECENCY AND RESPECT" CLAUSE IS UNCONSTITUTIONAL

The NEA argues that the court of appeals erroneously interpreted §954(d)(1) to require application of the "decency and respect" criteria to each grant. Pet. 16-18. But the NEA does not dispute that "decency and respect" must be taken into consideration in "the grant awarding process." Pet. 17. Therefore, nothing turns on the NEA's disagreement with the court of appeals over the minutiae of precisely how "decency and respect" are taken into account. As long as these terms are part of the "grant awarding process," their vagueness and viewpoint-based character will create all the risks of discrimination, arbitrariness and chill that the First Amendment is designed to forestall.

Moreover, the NEA's reading of the statute only exacerbates its vagueness. It has argued that the statute is so open-ended that it could be implemented in an infinite variety of ways. The NEA has interpreted the statute as "indeterminate," NEA C.A. Br. at 31, and has stated that there is "no way to predict what the Chairperson's [] manner of implementing it would be." *Id.* at 39. Thus, the NEA's own interpretation affords the NEA Chairperson untrammeled discretion -- the precise evil that the vagueness doctrine is designed to prevent.

Furthermore, no limiting construction can save an "indeterminate" statute. In *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964), this Court declined to abstain in order to permit a state court to construe a statute challenged as vague, reasoning that "the challenged [statute] is not open to one or a few interpretations, but to an indefinite number." For the same reason, the Court in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988), rejected a narrowing interpretation of a city ordinance that on its face gave the mayor unfettered discretion in allocating space for newsboxes on city property. The city asked the Court "to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens." *Id.* at 770. The Court declined, stating that "this is the very presumption that the doctrine forbidding unbridled discretion disallows." *Id.* Thus, even where a satisfactory saving construction has been offered, the Court cannot rewrite a perfectly vague statute. Where, as here, the agency's own reading of the statute accords itself unfettered discretion, no saving construction has even been put on the table.

Finally, the NEA's suggestion that §954(d)(1) does not require the application of the "decency and respect" standard to individual grant requests is contrary to the statute's plain meaning and legislative history.[14] Perhaps most tellingly, the NEA itself interpreted and implemented the statute, before its invalidation, to require every NEA official who re-

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[14] As noted above, the "decency and respect" provision's author, Representative Henry, introduced it as "a shell, a screen, a viewpoint that must be constantly taken into account." 136 Cong.Rec. H9417 (Oct. 11, 1990). He also described it as "new language now in the grant procedure itself which mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded." 136 Cong.Rec. H9457 (Oct. 11, 1990).

viewed a grant application to apply the "decency" and "respect" standards as they individually understood them.[15] Thus, the NEA's statutory construction arguments do not warrant *certiorari* review.

III. IN LIGHT OF THE GOVERNMENT'S CONCESSION THAT THE NEA PROGRAM IS NOT DESIGNED TO EXPRESS A GOVERNMENTAL MESSAGE BUT TO SUPPORT A DIVERSITY OF VIEWS FROM PRIVATE SPEAKERS, THE FIRST AMENDMENT PROHIBITS VIEWPOINT DISCRIMINATION

The statute at issue requires NEA officials to determine whether an applicant's work respects or does not respect "the diverse beliefs and values of the American public," and whether the work is consistent with "general standards of decency." These are classic instances of viewpoint discrimination. The statutory criteria direct a government official to favor respectful or decent treatments of subjects and to disfavor disrespectful or indecent treatments.

The NEA contends that the "decency and respect" clause does not discriminate on the basis of viewpoint. Pet. 18-19. But if a standard that turns on whether one shows *respect* or *disrespect* toward the American public's "beliefs and values" is not viewpoint-based, the term has no meaning. This Court has carefully distinguished viewpoint discrimination from subject matter prohibitions: the government may generally refuse to fund an entire subject, but when it takes sides by refusing to fund particular perspectives on that subject, it engages in viewpoint discrimination. Thus, the constitutional defect in *Rosenberger* was that "the University d[id] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints . . . . The prohibited perspective, not the general subject matter, resulted in the refusal to [fund]." 115 S.Ct. at 2517; *see also Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

Like the student funding program in *Rosenberger*, the NEA's "decency and respect" clause does not deny funding to art on a subject matter basis, but discriminates against those treatments of any subject that an NEA official deems "indecent" or "disrespectful." Thus, as the panel noted, a painting of the American flag could be funded if "decent" and "respectful," but not if deemed indecent or disrespectful of an indeterminate number of "beliefs and values." Pet. App. 24a.

The NEA argues that *Rust v. Sullivan*, 500 U.S. 173, permits Congress to impose viewpoint discriminatory criteria because it is merely subsidizing, not penalizing, speech. But this Court has already rejected that contention in *Rosenberger*. In *Rosenberger*, the university sought to defend its selective denial of funding to religious student magazines by relying on the same interpretation of *Rust* that the NEA advances here. Pet. 20; *Rosenberger*, 115 S.Ct. at 2518. The Court rejected that argument, and expressly restricted *Rust* to situations where the government itself "is the speaker or when it enlists private entities to convey its own message." 115 S.Ct. at 2518. In language fully applicable here, the Court held that it "*does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself*

[15] As detailed in the Statement of the Case, *see supra* pp.4-5, applications to the NEA were individually subjected to the "decency and respect" clause at every stage of the review process, from the initial panels' recommendations to the Chairperson's final approval.

speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 2519 (emphasis added).

The government acknowledged in the court of appeals that the NEA program is designed to encourage a diversity of views from private speakers, and not to fund "government art." It stated that "the artistic expression funded by an NEA grant is not the government's own speech; the NEA's award of the grant does not constitute government approval of a particular message or point of view that may be communicated by the work of art; and public funds support a diversity of projects and productions within the overall arts program." NEA C.A. Supp. Br. at 3-4. These admissions fully support the court of appeals' reliance on *Rosenberger*, and refute the NEA's attempt to rely on *Rust* now.[16]

The NEA objects that its funding program is different from the program at issue in *Rosenberger* because there 118 of 135 student groups were supported, whereas the NEA program is more selective. But the number of applicants who received grants cannot constitute a principled distinction. As the Court stated in *Rosenberger*, "the government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." 115 S.Ct. at 2519; *see also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811-13 (1985)(even in nonpublic forum, where access to government support for speech is by definition selective, the criteria for access to nonpublic forum must be viewpoint-neutral).[17]

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[16] As the language of the statute and the legislative history recounted in the Statement of the Case make clear, *see supra*, p.1, the last thing Congress wanted was to create a program of official government art. Thus, when President Johnson proposed to create the NEA, he insisted that the government not "seek to restrict the freedom of the artist to pursue his calling in his own way." S. Rep. No. 300, at 13. And Representative William Ford, speaking in favor of the bill, expressed concern that government funding, if implemented improperly, might hinder free expression, but concluded that "[i]f, however, we have Government assistance, but not intervention; if we have support but not control; if we have stimulation but not participation, then we shall have constructive action in the best interests of the Nation." 111 Cong.Rec. 23961 (1965).

[17] The dissent below offered a "prize" theory for justifying what would otherwise be impermissible viewpoint-based and vague criteria for government funding. Pet.App. 27a-47a (Kleinfeld, dissenting). In essence, the dissent contended that a highly selective funding program is more akin to a "prize" than a broad-based entitlement program, that viewpoint-based criteria are necessary to effectuate such selectivity, and that a "prize" program is unlikely to distort the marketplace of ideas. That theory finds no support in the case law, and is directly contrary to this Court's rejection of scarcity of available benefits as a rationale for viewpoint discrimination in *Rosenberger*. Because government always operates in a world of limited resources, any subsidy or benefit can be denominated a "prize." Neither the government nor the dissent below has identified at what degree of selectivity a benefits program, otherwise governed by the First Amendment, becomes a "prize" program immune from constitutional scrutiny. Moreover, the "prize" theory would allow government to circumvent any judicial decision declaring the criteria for a benefits program unconstitutional by simply making the program more selective and continuing to apply the invalidated criteria. The only relevant line this Court has recognized is the distinction between government speech and a government subsidy program designed to support a diversity of private voices. *Rosenberger*, 115 S.Ct. at 2518-19. And the government has conceded that the NEA program falls in the latter category.

IV. VAGUENESS STANDARDS APPLY TO THE SELECTIVE ALLOCATION OF FUNDING TO COMMUNICATIVE ACTIVITIES

As the court of appeals correctly found, the statutory reference to "general standards of decency" and "respect for the diverse beliefs and values of the American public" not only disfavors controversial viewpoints, but also fails to provide clear guidelines to either NEA applicants or government decisionmakers. Pet.App. 17a-19a. There is simply no meaningful way to determine the beliefs and values of the American public, much less to assess whether an artist's work "respects" or "disrespects" those beliefs and values. The "American public," if it could even be identified, would no doubt hold many conflicting beliefs and values, and to respect one may be to disrespect another. By the NEA's own admission, these criteria extend "indeterminate" discretion to the subjective views of the Chairperson and other NEA officials. That is the very definition of vagueness. Likewise, "general standards of decency" is hopelessly vague. *Reno v. ACLU*, __ U.S. __, __, 117 S.Ct. 2329, 2344-46 (1997).

Accordingly, the NEA is forced to argue that the vagueness doctrine simply does not apply to government subsidies for speech. Pet. 24-25. Because there is no affirmative First Amendment right to funding *ab initio*, they contend, neither the First nor Fifth Amendments require that the criteria used for allocating subsidies to speech be clear. *Id.* But that position, correctly rejected by the court of appeals, is directly contrary to this Court's precedents. On this theory, the ordinance struck down in *City of Lakewood*, 486 U.S. at 769-72, which gave the mayor unbridled discretion to allocate scarce public property for newsboxes, would have been constitutional; since there was no right to newsbox space, there should have been no constraint on the government employing "unbridled discretion" to allocate such

space. And if the government were correct, officials could adopt wholly vague standards for speakers' access to nonpublic forums, because access to such forums is a government benefit as to which there is no affirmative right. That conclusion is contrary to *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576-77 (1987), in which this Court refused to adopt a proffered construction of a regulation governing access to a municipal airport -- a nonpublic forum -- because the construction would have rendered the regulation unconstitutionally vague.

The NEA argues that the concerns that animate the First and Fifth Amendment vagueness doctrines are not present when the government subsidizes speech on wholly vague criteria, because denial of funds "does not penalize speech in any meaningful sense." Pet. 24. But as *City of Lakewood* and *Jews for Jesus* demonstrate, whether the government uses its purse strings or its police power to affect private speech in the marketplace of ideas, when it does so pursuant to vague criteria, the potential for discriminatory application and the consequent chilling effect on citizens' speech make the vagueness doctrine essential. Pet.App. 15a-16a.

Finally, the NEA's suggestion that if the NEA can consider "aesthetic excellence," it must also be free to consider "decency and respect," is unavailing, as the court of appeals and district court both held. Pet.App. 18a-19a, 86a-87a. Just as a public university may grant or deny tenure on the basis of academic merit, but not loyalty, *see, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 601 (1967)(holding that vague oath required as condition of employment as public school teacher "stifle[s] . . . 'free play of the spirit'" in violation of the First Amendment), so the NEA may allocate grants on the basis of artistic merit, but not decency. Artistic and academic merit standards, unlike "decency" and "respect," have governed the art and academic worlds for centuries, and have developed objective content through appli-

cation. If that were not the case, merit-based judgments in hiring, grading, and promotion, on which schools and employers routinely rely, would be impossible. *Cf. Gentile v. State Bar*, 501 U.S. 1030, 1049 (1991)(in assessing vagueness, court should look to whether terms have "settled usage or a tradition of interpretation"). "General standards of decency" and "respect for the diverse beliefs and values of the American public," by contrast, have no tradition of application, and are open to infinite interpretations based on inescapably subjective notions of decency, respect, and the American public's "beliefs and values."[15]

[15] The petition also should be denied because there is an independent basis for affirmance, not reached by the court of appeals. The "decency and respect" restriction is a classic unconstitutional condition, because it does not merely restrict what grantees can do with the government's funds; instead, it is part of "the criteria by which applications are judged," 20 U.S.C. §954(d)(1), and those criteria are applied to an applicant's entire body of work, including work created solely with private funds. *See supra*, pp.3-4. As this Court has stated, the government imposes an "unconstitutional condition" on funding for speech when it "place[s] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. at 196; *see also FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

CONCLUSION

For all the above reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: October 31, 1997

(4)

Supreme Court, U.S.
FILED
NOV 20 1997
CLERK

No. 97-371

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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10pp

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-371

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
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v.

KAREN FINLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

We urge this Court to grant certiorari in this case because the court of appeals has declared Section 5(d)(1) of the National Foundation for the Arts and Humanities Act, 20 U.S.C. 954(d)(1), unconstitutional on its face and void in all of its applications. See Pet. 15-16. Respondents concede that the court of appeals' "decision to declare a federal statute unconstitutional is no doubt important." Br. in Opp. 9. They nevertheless contend that certiorari should be denied because (1) the court of appeals' decision has not generated a conflict among the courts of appeals (*id.* at 9-12); and (2) in their view, the court of appeals'

decision is correct on the merits (*id.* at 12-20). Those arguments are unpersuasive.

1. Respondents argue that no other court of appeals has specifically addressed the constitutionality of Section 5(d)(1) and that this Court "should therefore deny *certiorari* until and unless a genuine conflict emerges." Br. in Opp. 9. The existence of such a conflict is a pertinent consideration in the certiorari calculus, but it is not determinative. See Sup. Ct. R. 10. That is especially so here. The Court has consistently granted certiorari, without waiting for a conflict among the circuits, when the United States has sought review of a decision of a lower court declaring a federal statute unconstitutional. See, *e.g.*, *Babbitt* v. *Youpee*, 117 S. Ct. 727 (1997); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995); *United States* v. *Gainey*, 380 U.S. 63 (1965); see also R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 185 (7th ed. 1993) ("Where the decision below holds a federal statute unconstitutional * * * certiorari is usually granted because of the obvious importance of the case.").

The Court grants review in such circumstances for good reason. A lower court's decision to invalidate a congressional enactment, which expresses the majority's will in a democratic society, involves the most momentous application of judicial power. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991); *United States* v. *Salerno*, 481 U.S. 739 (1987); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). This Court has a heightened obligation "to review the exercise of th[at] grave power" (*Gainey*, 380 U.S. at 65) where, as in this case, the lower court

has declared an Act of Congress invalid on its face, thereby preventing the National Endowment for the Arts (NEA) from uniformly applying the Act in the context of a nationwide program. See Pet. 26-27. Respondents are accordingly mistaken in suggesting that this Court should postpone review until the courts of appeals are in square conflict over the constitutionality of Section 5(d)(1). There is a pressing need to resolve that question now.[1]

2. Respondents direct most of their arguments to the merits of the controversy. They contend that Section 5(d)(1): (a) is not subject to a limiting construction that avoids the constitutional challenge (Br. in Opp. 12-14); (b) necessarily results in viewpoint discrimination that is impermissible under this Court's decision in *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (Br. in Opp. 14-17); and (c) sets out unconstitutionally vague criteria for awarding grants (*id.* at 18-20). Those arguments in defense of the court of appeals' decision are unconvincing. But what is more important at the petition stage is that they highlight why

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[1] We note that Judges Kleinfeld, O'Scannlain, and Kozinski concluded that the Ninth Circuit's decision in this case conflicts with the First Circuit's decision in *Advocates for the Arts* v. *Thomson*, 532 F.2d 792, cert. denied, 429 U.S. 894 (1976), and the Seventh Circuit's decision in *Piarowski* v. *Illinois Community College*, 759 F.2d 625, cert. denied, 474 U.S. 1007 (1985). See Pet. App. 30a-32a (Kleinfeld, J., dissenting); *id.* at 92a n.1 (O'Scannlain, J., dissenting from rehearing en banc). The First and Seventh Circuit decisions did not involve Section 5(d)(1), but they addressed closely analogous issues. The United States cited the tension between the Ninth Circuit's decision and those decisions as an *additional* reason why review is warranted. See Pet. 27-28.

this Court should grant the government's petition for review.

a. As we explain in the certiorari petition (at 16-18), the court of appeals created an unnecessary constitutional issue by construing Section 5(d)(1) to require that the NEA and its advisory panels "examine each grant application to determine if it comports with 'general standards of decency' and shows 'respect for diverse beliefs and values' as they subjectively understand these terms" (Pet. App. 17a), and automatically reject each application that does not. Respondents reply that the government merely disagrees "over the minutiae of precisely how 'decency and respect' are taken into account." Br. in Opp. 12. Not so. If—as the statutory text states—Section 5(d)(1) simply requires that the Chairperson "take[] into consideration" "general standards of decency and respect for the diverse beliefs and values of the American public," 20 U.S.C. 954(d)(1), and if—as we urge—those factors can be "tak[en] into consideration" in the overall administration of the program without requiring that decision-makers impose viewpoint-based restrictions in particular grant decisions, Pet. 18-19, then Section 5(d)(1) raises no serious constitutional problems. The question whether Section 5(d)(1) is subject to such a limiting construction is, by itself, an important matter, included within the question presented, that warrants this Court's review. See, *e.g.*, *Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055, 1074 (1997).

b. Even if the Court were to hold that the NEA must construe Section 5(d)(1) more expansively, the Constitution does not prohibit Congress from directing the Chairperson to take into consideration "general standards of decency" and "respect for the diverse beliefs and values of the American public" in awarding grants of public funds to support the arts. See Pet. 18-23. This case is controlled by the general principle, expressed in *Rust*, 500 U.S. at 193, that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest." See Pet. 20-22. In accordance with that principle, Congress may direct that the NEA take into consideration (in conjunction with the criteria of artistic excellence and artistic merit) whether federally funded art will reflect "general standards of decency and respect for the diverse beliefs and values of the American public," without "discriminat[ing] invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Rosenberger*, 515 U.S. at 834 (citation omitted). In contrast, respondents contend that Congress has engaged in impermissible viewpoint discrimination, essentially arguing, based on this Court's decision in *Rosenberger*, 515 U.S. at 830-831, that the NEA program simultaneously creates a public forum and discriminates against a "prohibited perspective." See Br. in Opp. 14-17.

We address the merits of respondents' contention, which reflects the reasoning of the court of appeals, in our petition. See Pet. 18-23. What is important, at this stage of the proceedings, is that respondents premise their argument on their construction of Section 5(d)(1), their characterization of the NEA program, and their perspective on the relationship between *Rust* and *Rosenberger*. Those premises are precisely the matters that sharply divided the en banc court of appeals and that this Court would examine in its review. The court of appeals was most seriously

divided on the question of the applicability of *Rosenberger*. Compare Pet. App. 22a-26a with *id.* at 32a-35a (Kleinfeld, J., dissenting) and *id.* at 94a (O'Scannlain, J., dissenting from the denial of rehearing en banc). The majority's application of *Rosenberger* in the context of a highly selective federal grant program, and in the context of criteria that are not viewpoint-suppressive in the sense *Rosenberger* discussed, is likely to have repercussions for a variety of other federal and state programs that subsidize expressive activities.[2] That issue therefore warrants resolution by this Court.

c. The court of appeals also erred in applying "void for vagueness" principles to the NEA grant program. Pet. 23-26. As we explain in the petition, this Court has never held that those principles, which the Court developed in cases involving direct regulation of speech, apply to congressional limitations on the receipt of federal funds under a selective grant program. Pet. 23-25. Respondents assert that "vagueness standards apply to the selective allocation of funding to communicative activities" (Br. in Opp. 18), but the cases they cite, *City of Lakewood* v. *Plain Dealer Publishing Company*, 486 U.S. 750 (1988), and *Board of Airport Commissioners* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), do not support that assertion.

---

[2] For example, respondents' assertion (Br. in Opp. 14-17) that consideration of "decency" necessarily constitutes discrimination on the basis of "viewpoint"—rather than a reference to aesthetic concepts or guideposts that concern the mode of expression of the art—greatly expands the scope of the term "viewpoint" beyond the distinctive meaning it has been accorded in First Amendment jurisprudence. See Pet. 18-20; *Rosenberger*, 515 U.S. at 828-830; *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 384-385, 388, 391-392, 393-394 (1992).

In *City of Lakewood*, the Court invalidated a city ordinance giving the mayor complete discretion over the decision whether to permit placement of newsracks on public sidewalks. 486 U.S. at 772. The Court ruled that the ordinance was invalid because it gave the mayor "unbridled discretion" to grant or deny licenses regulating the use of a traditional public forum. See *id.* at 755-759, 769-772. That case did not involve the conceptually distinct question of whether the First Amendment requires Congress to satisfy judicially imposed requirements of specificity when it establishes various criteria for the receipt of a government subsidy under a selective grant program involving expressive activity.

In *Board of Airport Commissioners*, the Court invalidated a resolution by the governing body of the Los Angeles International Airport banning all "First Amendment activities" within the "Central Terminal Area." 482 U.S. at 570-571, 577. The Court ruled that the resolution was "substantially overbroad" because it posed an absolute ban on all expressive activity and "no conceivable government interest would justify such an absolute prohibition of speech." *Id.* at 574-576. The Court rejected a proposal to construe the ban as limited to "expressive activity unrelated to airport-related purposes," noting that "the vagueness of this suggested construction itself presents serious constitutional difficulty." *Id.* at 576. Like *City of Lakewood*, the case involved direct government regulation of speech and not a government restriction on the use of federal funds.

The notion that the courts should apply First Amendment vagueness principles to government funding decisions is not only novel, but would lead to serious problems in practical application. For exam-

ple, respondents contend in this case that Section 5(d)(1)'s "artistic excellence" criterion has "objective content," but Section 5(d)(1)'s "decency and respect" criteria are "inescapably subjective." Br. in Opp. 19-20. That asserted distinction itself, however, merely reflects respondents' own subjective view about those criteria. By endorsing that distinction, the court of appeals has established a bold and problematic extension of the vagueness doctrine that warrants this Court's review.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1997

Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

No. 97-371

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED
AUGUST 29, 1997
CERTIORARI GRANTED NOVEMBER 26, 1997

90 pp

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Docket No. CV90-5236 AWT(SHX)

FINLEY

v.

NATIONAL ENDOWMENT FOR THE ARTS

RELEVANT DOCKET ENTRIES

9-27-90	lpc	1.	COMPLT. ISSD SMS
11/29/90	js	6.	ANSWER to cmplt. defts
3/27/91	js	16.	FIRST A/C. pltfs
4/26/91	js	20.	ANSWER to 1st A/C. defts
6/9/92	mm	79.	Memorandum Opinion: concl: The crt DENIES dfts mot for jdmt on the pldgs, except withe respect to plts 2nd clm. Fur, crt GRANTS plfs mot for S/J on the 6th clm, on the grounds that the decency clause, on its face, is void for vagueness on the 5th amd & is aoverbroad under the lst amd. A separate jdmt shl be ent on the 6th clm.

6/9/92	mm 80.	ORD & JDMT: That dfts mot jfor jdmt on the pl gs is GRANTED as to the 2nd cause of actn of the 1st amd cmp. In all other respects, the mot is DENIED. The mot of the plfs for S/J on the 6th cause of actn of the 1st amd cmp is GRANTED. Fur Ord that dfts & all persons in active concert or participation with them who receive ntc of this ord are permanently enjoined frm enforcing said "decency" clause. (ENT 6/10/92) Mld cpys/ntc
8/7/92	dlm 92.	DFT FLD NTC OF APP TO THE 9th C/A FRM ORD/JGM FLD ON 6/9/92. FEES WAIVED. PTY SVC: THEODORE C. HIRT, MARK W. BATTEN: MARJORIE HEINS: MARY DORMAN: DAVID COLE: ELLEN YAROSHEFSKY: PAUL L. HOFFMAN: NAN D. HUNTER ON 8/19/92.
8/24/92	mm 9[5].	CRTS ORD: That dfts mot for entry of jdmt is GRANTED & a final jdmt under Rule 54(b) shl be ent on the 4th cause of actn. That crt shl enter a final jdmt under 54(b) on the 2nd cause of actn. PTC is cont to 10/26/92 @10am.
"	" 96.	CRTS ORD: That 2nd cause of actn of the 1st A/C is dism on the merits & plfs shl take nothing. On the 4th cause of actn of the 1st

		A/C a decl is ent in plfs fvr. Entry of sep jdmt. Purs to FRCP 54(b) the crt expressly determines that there is no just reason for delay & expressly directs the entry of this jdmt as a final jdmt. The award of costs & attys fees, if any, shl abide the final determination of the remaining clms in this actn. (ENT 8/27/92) Mld cpy/ntc by CRD S. Keir on 8/25/92.
10-23-92	cmh 105.	DFTS, NATL ENDOWMENT FOR THE ARTS & ANNE-IMELDA RADICE, FLD NTC OF APP TO THE 9TH CCA FRM JMT FLD 8-24-92 & ENT 8-27-92. FEES WAIVED. PTY SVD: THEODORE C. HIRT/ MARK W. BATTEN, AUSA STAN BLUMENFELD, MARJORIE HEINS, MARY DORMAN, DAVID COLE, ELLEN YAROSHEFSKY, PAUL L. HOFFMAN, & NAN D. HUNTER ON 10-29-92.
11/4/92	mm 109.	STIP & ORD: That dfts are enjoined to reconsider pplfs 1990 applic. A stay of inj pending app by the dfts & the outcome of the remaining clms in this case.
11/16/92	mm 110.	STIP & ORD: That dfts are enjoined to reconsider plfs 1990 applic. The Chair person of the Nat'l Endowment for the Arts shl present these applic to the Nat'l

			Council on the Arts at a regularly scheduled mtg of the Council, & obtain the collective recommendations of the Council to the Chairperson after the council has had the opportunity to review the applic & engage in a colle discussion to the extent deemed necessary. The Chairperson shl then act on the applic purs to 20 U.S.C. §954-55. A stay of the inj set out above pending app by the dfts. By stip to the entry of this inj, dfts do not waive their right to app frm the crts jgm on plfs 4th cause of actn or any other clm in this case.
1-4-93	pb	112.	DFTS, FLD NTC OF APP TO THE 9th C/A FROM ORD FLD 11-4-92 & 11-16-92.
6/11/93	mm	128.	STIP & ORD: Re sttlmt agreementThat dfts agree to pay to plfs Finley, Fleck, Hughes & Miller the sum of $252,000 in full & final sttlmt of plfs 1st, 3rd, & 5th causes of actn. Any clms by any of the plfs arising frm these causes of actn, or plfs 4th cause of actn shl be forever barred. (See doc for amt breakdown (ENT 6/14/93)
"	"	129.	CRTS ORD: That all remaining causes of actn w/i the juris of this crt (i.e., not w/i the jurisd of the CCA), to wit, the 1st, 3rd & 5th causes of actn are dism w/o prej for a period of 100 dys & shl thereafter be w/prej, unless a timely mot to reopen has been fld. Plfs may move to set aside these dism at any time w/i 100 dys for failure of dfts timely to tender the sttlmt sum. (ENT 6/14/93) MD JS-6 mld cpys/ntc
5/19/97	rm	132.	MO: filing & spreading the mandate of 9th CCA in chambers, cnsl notified affirming the decision of USDC on appeals filed 10/23/92 & 1/4/93. (ENT 5/21/97)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Nos. 92-56028, 92-56040,
~~92~~-56055 and 92-56063

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES; TIM MILLER; NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; ANNE-IMELDA RADICE, IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS-APPELLANTS

RELEVANT DOCKET ENTRIES

8/24/92 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. * * *

12/3/92 Filed motion & order * * * On its own mtn the ct orders that 92-56028 and 92-56387 be consolidated. * * *

2/3/94 ARGUED AND SUBMITTED TO James R. BROWNING, Warren J. FERGUSON, Andrew J. KLEINFELD [92-56028, 92-56387, 93-55089] (dr) [92-56028, 92-56387, 93-55089] * * *

7/14/95 Filed order (James R. BROWNING, Warren J. FERGUSON, Andrew J. KLEINFELD,): The

parties are ordered to provide the court with supplemental briefs within 15 days of this order. * * *

11/5/96 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. James R. BROWNING, author; Warren J. FERGUSON; Andrew J. KLEINFELD, dissenting.) FILED AND ENTERED JUDGMENT. [92-56028, 2-56387, 93-55089] (hh) [92-56028, 92-56387, 93-55089]

12/23/96 [3141687] Filed Original and 40 copies Appellant Natl. Endowment for the Arts' petition for rehearing with suggestion for rehearing en banc * * *

1/30/97 Filed order (James R. BROWNING,): Appellees are requested to file a response to appellants' petition for rehearing and suggestion for rehearing en banc.

5/1/97 Filed order FOR PUBLICATION (James R. BROWNING, Warren J. FERGUSON, Andrew J. KLEINFELD,): A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. FRAP 35. The petition for rehearing is DENIED and the suggestion for rehearing en banc is

REJECTED. O'SCANNLAIN, Circuit Judge, Joined by KOZINSKI and KLEINFELD, Circuit Judges, dissenting from order rejecting suggestion for rehearing en banc . . (see order for full text) [92-56028, 92-56387, 93-55089] (hh) [92-56028, 92-56387, 93-5509]

5/9/97 MANDATE ISSUED. Costs taxed against appellants in the amt of $237.00 [92-56028, 92-56387, 93-55089] (hh)

MINUTES OF THE DECEMBER 1990 RETREAT OF THE NATIONAL COUNCIL ON THE ARTS

The Hay Adams
One Lafayette Square, N.W.
Washington, D.C.
December 14 & 15, 1990

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At the hundred-and-fifth meeting of the National Council on the Arts, the Council unanimously voted to hold a retreat to analyze issues generated by the 1990 legislation reauthorizing the Arts Endowment. The following is an account of that retreat.

Note: This group came together as a deliberative body of the Council and, as such, did not enact or create policy during the retreat.

[11]Decency Provision

Ms. Davis offered three proposals for the consideration of the Council which she believed satisfied the statutory requirement that applications be judged taking in consideration general standards of decency. All proposals were based on the premise that general standards of decency must be discussed in the context of artistic excellence and the protections afforded by the First Amendment of the Constitution.

Proposals

1) General standards of decency would be applied by grant-review panels as a matter of course because each panelist brought to the table their community's standards of decency and this would become part of the deliberative process.

2) In addition to standards of decency being applied by diverse panel representation, a copy of the Endowment's legislation would be provided to panels along with an oral presentation by staff, and

3) Language referencing the context of general standards of decency would be inserted within the Endowment's statement of purpose in all guidelines.

Note: The language would provide a contextual interpretation of general standards of decency within the Endowment's mission, it would not serve as guidelines on decency standards.

O-MT Panel Statement

A statement regarding the decency provision was prepared by the Opera-Musical Theater Overview panel and read by Ms. Bliss (Appendix D):

"The Opera-Musical Theater Program Overview panel reiterates in writing our unanimous objection to any reference or inclusion of Congress' so-called 'decency clause' in the 1992-93 application guidelines. Standards of decency are subjective, indefinable, and irrelevant to the consideration of artistic excellence, which is the primary concern of this panel and the National Endowment for the Arts."

Council members questioned whether or not actual language referencing general standards of decency was perceived as a Congressional requirement.

[12] Ms. DiNapoli believed Congress did not intend for language to be placed in Endowment guidelines.

Motion

After a brief discussion, Mr. Kingston made a motion to accept option one, and that strengthening the diversity of panels took care of the issue of general standards of decency. Motion was seconded by Ms. Luers and was passed by a unanimous vote

Education Program Provisions and Initiatives

Statutory Requirement	The new legislation contains a statutory requirement mandating that any time the Endowment's appropriation exceeds $175 million, fifty percent of the increase must go into the Arts in Education Program. As voiced by several Council members, discussing a mandate which specifies how to spend funds not yet available to the agency is a difficult task. However, some philosophical points were raised about the use of current funds which would impact increased spending in the future.
Inclusiveness	o In order to meet the mandate of increasing accessibility to the arts through providing education to all Americans, including diverse cultures and urban and rural popu lations, Messrs. Johnson and Gar fias underscored the need for the Endowment to proactively work with all States. Therewas concern over some States not receiving funding due to poor grantsmanship. Additionally, the concept of educa tion must be an agencywide con cern. Note: Mr. McAusland assured members this was being done and talked about the Endowment's internal working group on Arts

	Education which is addressing these issues.
Model Projects	o Funding model projects was suggested by Ms. Curtin. This would enable the Endowment to con sistently commit funds, over the long term, to affect [sic] change in the field of arts education. Note: Ms. Curtin felt the uncertainty of additional funds for Arts in Education, given the uncertainty of appropriation levels, would have an adverse effect on across the board educational initiatives no longer supportable due to fluctuating appropriations. Mr. Johnson thought the concept of funding model education projects in rural and inner city areas, with a reporting requirement on the number of new people reached, worth exploring.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 90-5236 AWT (Kx)

KAREN FINLEY, ET AL., PLAINTIFFS

v.

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.

Date: December 16, 1991
Time: 10:00 a.m.
Dept: A. Wallace Tashima

PLAINTIFFS' STATEMENT OF
UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW

Pursuant to Local Rule 7.14.1 of this Court, plaintiffs present the following statement of uncontroverted facts as to which there is no material issue, and proposed conclusions of law, in support of their accompanying motion for partial summary judgment.

Statement of Uncontroverted Facts

1. In 1990, Congress amended 20 U.S.C. §954(d), which governs National Endowment for the Arts (NEA) grants. That statute now reads, in pertinent part:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures [compliance with which is required prior to any payment being made under this section], the Chairperson shall ensure that
>
> > (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public. . . .

20 U.S.C. §954(d). This provision will be referred to herein as the "decency" provision.

2. Defendants are charged with enforcing and implementing the above language in judging all applications for NEA funds. 20 U.S.C. §954(d).

3. In December 1990 the National Council on the Arts voted to adopt a statement that "[g]eneral standards of decency would be applied by grant-review panels as a matter of course because each panelist brought to the table their community's standards of decency and this would become part of the deliberative process." Minutes of Retreat of National Council on the Arts, Exhibit 1 to Amended Complaint.

4. Defendants have not issued any regulations or instructions defining the meaning of "decency" in the challenged provision.

5. The then-General Counsel for the NEA, Julianne Ross Davis, has stated that "general standards of decency is a very slippery, very broad, and very vague standard." Transcript of Retreat of Na-

tional Council on the Arts at 104, Exhibit A to Declaration of David Cole.

6. The Opera-Musical Theater Overview Panel of the NEA stated that "Standards of decency are subjective, indefinable, and irrelevant to the consideration of artistic excellence." National Council on the Arts Retreat Minutes at 11-12, Exhibit 1 to Amended Complaint.

7. Defendant John Frohnmayer has stated that "no one individual is wise enough to be able to consider general standards of decency and the diverse values and beliefs of the American people all by him or herself." Department of the Interior and Related Agencies Appropriations for 1992, Hearings Before the subcommittee on the Department of the Interior and Related Agencies of the Committee of the House Committee on Appropriations 234 (Feb. 21, 1991).

8. In judging applications for NEA funds, the NEA considers an applicant's past record as well as future potential. NEA Application Guidelines for Fiscal Year 1992 Theater Grants at 1, 15, Exhibit B to Declaration of David Cole; Frohnmayer, Talking Points for Community Forum Public Meeting, Ivar Theater, Los Angeles, CA, January 24, 1991, at 3, Exhibit C to Declaration of David Cole.

9. Some NEA grants are awarded on a matching basis, and in these instances the "decency" provision applies to funding from non-federal sources. The Independent Commission, A Report to Congress on the National Endowment for the Arts 32-34 (Sept. 1990).

10. Plaintiffs Holly Hughes, Tim Miller, John Fleck, and certain members of NAAO have applied for

or intend to apply for NEA funds, and therefore their applications, including their past and current work, will be subject to the "decency" provision. Plaintiffs Hughes, Miller and Fleck create artwork that addresses controversial issues of sexuality, particularly homosexuality, and power. They were singled out by critics of the NEA and the NEA itself during 1990 because of the controversial content of their work. The fact that their work will be judged under the "decency" standard has chilled and deterred their freedom of expression, and continues to do so. Declarations of Hughes, Miller, Fleck, and Murphy.

11. Plaintiff Finley and certain other members of NAAO have been deterred from applying for NEA funds by the "decency" provision. But for the provision, they would apply for and would be eligible to compete for NEA funds. Declarations of Finley, Murphy.

12. Plaintiffs Hughes, Miller, Fleck, and Finley were singled out by critics of the NEA and the NEA itself during 1990 for creating controversial or indecent art work. See NEA documents attached to Declaration of Sobel. Each artist openly addresses controversial issues of sexuality in their work. Declarations of Hughes, Miller, Fleck, and Finley.

13. Plaintiff NAAO has had to devote significant resources to addressing the chilling effect of the "decency" provision on its members. Declaration of Murphy.

Proposed Conclusions of Law

1. This Court has jurisdiction over this action.
2. Plaintiffs have standing to sue.

3. The "decency" provision of 20 U.S.C. §954(d)(1) is unconstitutionally vague in violation of the First and Fifth Amendments to the United States Constitution.

4. The "decency" provision of 20 U.S.C. §954(d)(1) violates the First Amendment because it restricts the rights of NEA grant recipients to express themselves freely on their own time and with non-federal funds.

5. The "decency" provision of 20 U.S.C. §954(d)(1) violates the First Amendment because it draws an impermissible viewpoint- and content-based line in a context requiring government neutrality.

DATE: November 1, 1991 Respectfully submitted,

DAVID COLE
CENTER FOR CONSTITUTIONAL RIGHTS
MARY DORMAN
Counsel, NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION
PAUL L. HOFFMAN
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ELLEN YAROSHEFSKY
Counsel, NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION

By: /s/ DAVID COLE
DAVID COLE
Attorneys for Plaintiffs

DECLARATION OF CHARLOTTE MURPHY

I, Charlotte R. Murphy, do hereby declare as follows:

1. I am the Executive Director of the National Association of Artists' Organizations (NAAO), which is a plaintiff in this case. NAAO is a national nonprofit association of individual artists and artists' organizations, including art galleries and performance spaces. It currently has 253 individual members and 358 organizational members.

2. NAAO is dedicated to serving and promoting nonprofit organizations engaged in the presentation and support of new and contemporary work in the visual, performing, literary, media, and interdisciplinary arts. Organizations that belong to NAAO have presented and supported the work of many people who are now recognized as among the major artists of our time, including Meredith Monk, Laurie Anderson, Julian Schnabel, Cindy Sherman, and Robert Mapplethorpe.

3. Among NAAO's objectives is to fight laws that burden its members' freedom to create and display new art. NAAO joined this lawsuit in March 1991 specifically to challenge the "general standards of decency" requirement that was added to the National Foundation on the Arts and Humanities Act in December 1990.

4. New and contemporary art of the type presented or created by many NAAO members is by definition often provocative and threatening to traditional or conservative values or notions of morality. It often addresses issues of sexuality, gender, and sexual politics. Therefore, NAAO members are afraid

that the "general standards of decency" requirement will bar then from receiving NEA funding. While no one can know with certainty what is or is not barred by this extraordinarily vague standard, the artists most vulnerable to its vague language are those who, like NAAO members, present or create provocative and controversial art. The following are two examples of such art; they are representative, but not exhaustive.

5. The Franklin Furnace Archive, Inc., a NAAO member located in New York City, is a museum and gallery that collects and exhibits contemporary multidimensional art forms. Franklin Furnace houses one of the largest collections of art books and other publications, over 10,000 volumes, devoted to underground and alternative art movements. Many of the artistic images contained in this collection are sexually explicit, and might be considered inconsistent with "general standards of decency."

6. Moreover, Franklin Furnace frequently exhibits the work of artists whose themes include sexuality. Among these artists are practitioners of "appropriationism," a major movement in art photography and painting in the last decade or so. David Salle, a well-known painter whose work has been shown at Franklin Furnace, often "appropriates" existing photographs taken from sexually explicit publications such as Hustler or Screw, but explores the subject in aesthetically different ways than the original photographs. Nonetheless, with the concept of "indecency" undefined in the statute, such images could be found to violate that standard solely because of their subject matter.

7. As another example, the Visual Studies Workshop (VSW), a NAAO member located in Rochester, New York, exhibits new and contemporary works of visual art and also publishes a monthly journal of criticism and arts reportage called Afterimage. Afterimage regularly prints photographs, films and video stills, and other images to illustrates its articles. Because a large number of contemporary visual artists are exploring topics of sexuality, many of the images reproduced in Afterimage, as well as the works exhibited by VSW, might be considered "indecent."

8. NAAO has members who would be eligible to and would in fact apply and compete for NEA grants but for the "decency" requirement. These individuals will not agree to reveal their identities because they fear that becoming publicly identified as challenging the "decency" requirement will lead to adverse publicity and denials of future funding. These individuals include:

(a) A poet whose themes include cultural rebellion, who is also the administrator of a major poetry venue in New York City. He has been widely published and has received many grants and awards.

(b) A performance artist and arts administrator in the Midwest whose works deal specifically with issues of sexuality and gender, and who employs nudity in his performances. He has for years been a member of the faculty at two of the most prominent art schools in the midwest.

9. Other well-known artists who are not NAAO members have been prevented from applying for NEA funding because of the "decency" requirement. For

example, Joseph Papp, for more than 35 years director of the New York Shakespeare Festival in New York City, which operates the Public Theater, has stated that he would not apply for NEA grants so long as the "decency" requirement remained in effect.

10. NAAO also has numerous members that have applied for NEA funding despite the "decency" requirement but that are chilled in their applications and in the scope of their projects by uncertainty about what the standard means or how to comply with it. These members include organizations that consistently present performance art, theater, music, dance, poetry, or installation work (site-specific visual art) that address the fundamental human concerns of sexuality, gender, sexual violence, homosexuality, and society's response to the AIDS crisis.

11. These NAAO members are harmed by the "decency" requirement because it may disqualify or disadvantage meritorious applications from organizations that have presented art dealing with sex or homosexuality, nudity, violence, or other highly-charged and provocative issues. If these organizations are denied NEA funding because the work that they have presented or seek to present is deemed "indecent," they will suffer additionally because frequently private grantsmakers rely on the NEA's judgments in deciding whether to supply additional funds. On the other hand, if the organizations do receive funding, they are subject to continuing oversight by the NEA to assure compliance with the "decency" amendment.

12. Among the NAAO members in this category are:

(a) A major arts organization in New York City that presents important new experimental performance art, music, theater, poetry, and installation work in public spaces such as beaches, parks, empty warehouses, and other buildings.

(b) A publication in Los Angeles that deals with performance art and has featured articles on the work of plaintiff Tim Miller and other prominent performance artists. This publication, in the course of reporting on and reviewing performance art, uses both words and photographs that could be considered "indecent."

(c) A multidisciplinary art gallery in Chicago which features performance art, painting and sculpture, and off-site work dealing with sexuality.

(d) A gallery in San Francisco devoted to paintings, photograph, sculpture and prints, often with sexual themes.

(e) A major gallery and performance space in New York City which has in the past featured the work of such prominent artists as Karen Finley, David Wojnarowicz, and Nan Goldin, whose works deal with sexual themes and have been the subject of previous political attacks on grounds of "indecency."

These organizations will not agree to reveal their identities because they fear that becoming publicly identified as challenging the "decency" standard will lead to adverse publicity and denials of future funding.

13. The "decency" requirement has a particularly adverse effect on individual and organizational NAAO members who apply for grants. Because artists develop themes, styles, and subjects of concern in an integrated manner, they cannot segregate their work into categories of "decent" and "indecent." The NEA's review of an artist's grant application is based on the entire body of her previous work. An artist whose work in the past might be considered "indecent" is thus less likely to receive a grant today because of the decency requirement. An artist who does receive NEA funding, subject to the decency requirement, will be inhibited in all of her work during the grant period because of the NEA's continuing oversight.

14. In addition to harming NAAO's organizational and individual members, the "decency" requirement also harms NAAO itself. NAAO has had to devote time, energy, and resources to advocating against the decency standard, assisting its members in responding to the standard, and participating in this litigation.

15. The "decency" requirement has already had a chilling effect on grant applications and on the NEA's ability to fulfill its role as a promoter of what is most original and significant in contemporary art. At the recent meeting of the National Council on the Arts on August 3, 1991, which I attended, a member of the visual arts fellowship peer panel reported that this year's applications were disappointing because as a group they presented work and ideas that were much less imaginative and challenging than in previous years. Similarly, a number of other individuals who serve on peer review panels in the areas of performance and visual arts have told me that the applications this year reflect significantly less concern with gender and sexuality and are tending to address "safer issues."

16. The "decency" amendment has also caused the NEA to monitor the use of grants in ways that are chilling artistic freedom and intimidating grant recipients. For example, the NEA recently demanded recoupment of funds from a dance and performance arts space in New York City, a NAAO member, that devoted one issue of its newsletter to the theme of gender (i.e., masculinity or femininity, rather than biological sex) as a system of "social codes and gestures" that constitute a kind of performance or theater. The issue was illustrated with photographs that included images of nudity, cross-dressing, and transsexuals. In another incident, the NEA investigated the use of grant funds by another NAAO member, a gallery in San Diego, for a public art project whose theme was police brutality. Although the NEA found that the project fully conformed to agency guidelines, it announced that it would be revising those guidelines so that they would in the future prohibit art projects that address "a specific advocacy issue."

Signed under the pains and penalties of perjury this __ date of September 1991.

/s/: CHARLOTTE R. MURPHY
CHARLOTTE R. MURPHY

DECLARATION OF DAVID COLE

1. I am one of the attorneys for plaintiffs in Finley v. National Endowment for the Arts, No. CV 90-5236 AWT (Kx). I submit this declaration to identify the documents attached hereto as exhibits in support of plaintiffs' Motion for Partial Summary Judgment. All of the exhibits were created by defendants, and all but Exhibits B and D were produced to us by defendants in discovery.

2. Exhibit A is a portion of the Transcript of the December 1990 Retreat of the National Council on the Arts.

3. Exhibit B is selections of the Fiscal Year 1992 Application Guidelines for Theater Grants. This is a public document.

4. Exhibit C is a document entitled "Talking Points: Community Forum public meeting, Ivar Theater, Los Angeles, CA—January 24, 1991," and consists of talking points for an address by defendant Frohnmayer.

5. Exhibit D is a document entitled "Addendum E," and sets forth terms governing organizations receiving NEA support for subgranting. It was provided by an organization receiving NEA support for subgranting.

6. Exhibit E is a document created by Julianne Ross Davis, then-General Counsel to the NEA, entitled "Constitutional Analysis of the FY90 Appropriations Obscenity Language."

7. Exhibit F is a January 31, 1990 Memorandum from Jessica Andrews, then-Director of the NEA's Theater Program, to the Theater Advisory Panel.

8. Exhibit G is a document entitled "Talking Points for 1st Amend. Congress, KC, MO 4/19/91," and consists of talking points for an address by defendant Frohnmayer.

I declare under penalty of perjury that the above is true and correct to the best of my knowledge, information and belief.

DATED: October 4, 1991

/s/ DAVID COLE
DAVID COLE

Exhibit A to Cole Declaration

* * *

(Recess.)

MR. MANDLE: We now move on to some rather important business that I'm going to ask Julie Davis to get into by describing the issues from the legislation concerning the decency provision that has been inserted there. And then we can have our discussion go from there.

OVERVIEW OF NEW LEGISLATION RESUMED

MS. DAVIS: Okay, as you all know our re-authorizing language has included a reference to decency. Basically, the legislature says that we shall that artistic affluence and artist matter are the criteria by which applications are adjudged. And then there was a caveat—taking into consideration general standards of decency and respect to the diverse beliefs and values of the American public.

This is a provision that has been approached and thought about and discussed with great care. I have spent probably the vast majority of my working time since October 11th trying to puzzle through this and in doing so I have consulted a great many people. I have consulted legal scholars, constitutional law scholars. I have discussed it with lawyers of every ilk and concern and I have also spoken with people within the Endowment trying to figure out what is the best way to approach this.

Now general standards of decency is a very slippery, very broad and very vague standard. The term decency defines definition and when taken out of context has no definition and when taken out of context has no definition. That is the conclusion that I have

reached and that it only has definition when it is taken in the context of artistic excellence and also surrounded with the protections afforded by the First Amendment of the Constitution.

With all of my discussions and all of my thoughts we have come up with three proposals for you to discuss. I have received other suggestions from other sources and have rejected them for one reason or another. But the three proposals that I'm going to put in front of you today are the proposals that I think meet the statutory requirement and are legal and within the confines of the Constitution.

The first suggestion that I would offer to you is that we approach this problem on a procedural plan. In other words, later in our legislation when it directs us to ensure that our panels are represented in a diverse manner both geographically, ethnically, minority, aesthetic point of view, that that is the way in which we achieve this goal and in other words, we make sure that we have a very well represented panel.

When those people come to Washington to do their deliberations either Randy or John or myself will visit each panel and we will answer their questions as to how they are supposed to take general standards of decency into consideration. The instruction that they will receive is that you represent a very diverse part of the United States. You represent very many different backgrounds. Your ethnic backgrounds are different. Your geographic backgrounds are different and that general standards of decency is something that cannot be one opinion. It means you have to have opinions and you have to have considerations from a wide variety of people, backgrounds, points of view in

order to also take into consideration the diverse beliefs and values of the American public.

So the basic instruction that the panels receive in fact by virtue of your backgrounds and by virtue of your diversity you represent the general standards of decency and the discussions that you make and the deliberations that you engage in bring with you your standards. You bring with you your general standards of decency from your communities, from you backgrounds, from your ethnic backgrounds, and that is how we deal with it.

There is a second way. Essentially we would take the same approach as to—essentially on a procedural basis by ensuring that our panels are well represented. It's where we get to the general standards of decency and the respect for the diverse beliefs and values of the American public. In addition, when the panels come to Washington we would give them a copy of our legislation and again speak with them at the beginning of each panel meeting. Explain to them that we think that general standards of decency can only have meaning in the context of artistic excellence and in the context of a consideration of the diverse beliefs and values of the American public.

The fourth way is again through a process ensuring that our panels are very diverse and widely represented. And I passed around an example of our guidelines. Each of you have a copy of it. It's just a sample but I gave it to you to see where this third proposal would be inserted.

And basically at the beginning on page 1 there is a preface and then there is a statement called statement of mission—National Endowment for the Arts

and then a preamble. And the preamble is basically saying what the Endowment is all about, what our mission is, where we're trying to go and what we are trying to accomplish in our grant making process.

Below that there is a subheading missions and it says the mission of the National Endowments for the Arts is to foster the excellence, diversity, and vitality of the arts in the United States and to help broaden the availability and the appreciation of such excellence, diversity and vitality. All this would remain the same. There have been some changes that I have been working with people on the preamble.

Now if you turn to page 2 you see a subheading that says What and there are a series of bullets there. Then if you turn to page 2 of the insert that is provided you will see that there is a What and there is a series of bullets. Then if you turn to page 3 the bullets continues. I have added a paragraph prior to the subheading, how, and this is the way that we would address the general standards of decency. I read it to you.

No single consideration is determined here and this list is by no means exclusive. Rather this is a list we pledge considerations informing the ultimate aesthetic judgment by the National Endowment for the Arts regarding an application, artistic merit and artistic excellence. The National Endowment for the Arts ensures that its panels are representative of the diverse view of the American public. Each panel to the extent possible is composed of individuals of diverse ethnic, geographic and aesthetic backgrounds and is fairly balanced gender wise.

In so doing the Endowment ensures that within the framework of constitutional protections of freedom of speech, expression and religion that general standards of decency are considered to avoid the funding of works that are obscene and thus are without artistic merit and are not protected speech.

Those are the three proposals that I have to present to you. Like I said I have received other suggestions and I am open to suggestions today, too, but these are the three that I have settled on that will meet the statutory requirements and at the same time maintain our mission to foster the very best and the most excellent of art in America.

MR. MANDLE: Sally?

MS. BLISS: Roger, I would like to present a statement. I attended and observed the Opera Musical Theatre panel meetings for 2 days in the beginning of December. And they presented me with this statement I think I should read right now.

The Opera Musical Theatre Program Overview Panel reiterates in writing our unanimous objection to any reference or in conclusion of Congress so called decency clause. That's in quotes. In the 1992-93 application guidelines standards of decency are subjective and definable and irrelevant to the consideration of artistic excellence which is the primary concern of this panel and the National Endowment for the Arts.

We have vehemently opposed and avoided any consideration of "decency" as a funding criteria during our deliberations and, therefore, we disassociate ourselves from the addition to the guidelines of any language referencing this issue after our panel has

adjourned. And it's signed by the overview panel panelists.

And I have one for everybody if you would like to pass them around.

MR. MANDLE: I might add that in this memorandum that John received and that we were also sent—although I guess I'm the only person here who has such a copy. There is in their statement, dated December 12, also a group of three statements in opposition to the inclusion of any reference of consideration of general standards of decency in the application guidelines. So I will pass this around to you.

And there may or may not be others. I am only simply dealing with what has been put in front of me.

MR. GARFIAS: Roger, I forget who was that memorandum from?

MS. LUERS: Mine is Opera Musical Theatre.

MR. MANDLE: Mine is Playwrights Fellowship panel.

MS. LUERS: May I ask Rose a question?

MR. MANDLE: Yes.

MS. LUERS: Rose, from your best guesstimate how would you think the Congress would respond if at all if there was not a decency statement in our guidelines?

MS. DI NAPOLI: Well, there are 535 members of Congress. I think many of them have to review this and I don't really think I can make that judgment.

MS. LUERS: Do you think some of those 535 members of Congress will create a problem if we did not have decency in the guidelines?

MS. DI NAPOLI: A very small number. Just probably our critics will jump on it, but I don't think it was the intention of the managers of the legislation that there be something in writing in our guidelines —any kind of definition of decency and that at least the staff of principals at work on this bill have indicated that.

MS. LUERS: So therefore if we were to remove the decency from the guidelines, you do not foresee that we would face any enormous political challenge to the National Endowment for the Arts?

MR. FROHNMAYER: Well, they're not in there, Wendy. What we're asking you for is advice as to how we can treat this issues. It's not a question of removing our heads about the 1990 grants and I have a letter from Billy Tisch here which WNYC has just turned down their 1990 grant because the language was not removed. Is it appropriate that we have a discussion about that at this time?

MR. FROHNMAYER: Well, those matters are in litigation at this time and it is a public meeting. It is not my preference to do that.

MS. LUERS: But John, if you remove it retroactively then the litigation goes away.

MR. FROHNMAYER: Not necessarily.

MS. LUERS: Why not?

MR. FROHNMAYER: I have been a lawyer from a long time and I have never given legal advice in a

public meeting unless I was asked to and being paid for that.

(Laughter.)

MR. MANDLE: Talbot?

MS. MACCARTHY: Getting back to what we are discussing. We had a proposed motion and a couple of comments but I don't think as a group we really have gone on the line to say that we think option 1 is the one—if we all do that that's what we would recommend that the chairman follow. I think we should be somewhat official about that. That's a pretty big decision.

MR. GARFIAS: Are we a formal league constituted body?

MS. MACCARTHY: Or a straw vote?

MR. MANDLE: We can certainly take a vote to recommend that out of this session and I would think that over the course of the next 2 days we are going to sharpen our focus on a lot of these issues and want to make recommendations that we do vote on them as a retreat body considering things for the council.

MS. MACCARTHY: I think we should so that John really know that we are all in agreement and it seems that we are.

MR. MANDLE: Well, let me ask the question, are we ready then to make recommendation about this issue as sooner we can off the dime and do it.

(General Ayes.)

MR. MANDLE: Do you want to frame that as an official motion?

MR. KINGSTON: Then I frame it as an official motion, seconded by Randy that we take option number 1 which is to strengthen the panels and the diversity that we have discussed carefully this morning and make no verbal reference, no written reference to the issue of decency within the guidelines.

MR. MANDLE: Because it was taken care of?

MR. KINGTON: Because it is taken care of procedurally and through the Constitutional Bill of Rights which is an implicit rule of behavior for all of us.

MR. MANDLE: Is there a second to that?

MS. LUERS: I second that.

MR. MANDLE: Any further discussion?

(No response.)

MR. GARFIAS: Question: All those in favor? Ayes.

(A show of hands.)

MR. MANDLE: Opposed?

(No response.)

MR. MANDLE: Abstentions?

(No response.)

MR. MANDLE: It is carried.

MR. FROHNMAYER: Well, I would say this to you ladies and gentlemen, we will I think follow that advice and it is my view that although I am by the

statute required to ensure this, that that insurance can only come through this procedure of wide representation on the panels and the National Council. So there will not be a case that I would impose my own judgment once the panels and council have made those decisions. In other words I am not going to be the decency tzar here. I am going to count on these procedures to fulfill that mission in so far as it's required of us.

Exhibit B to Cole Declaration

Exhibit B. Fiscal Year 1992 Application Guidelines for NEA Theater Grants

[Exhibit B cannot be readily reproduced in this format. Copies will be lodged with the Clerk of the Clerk.]

Exhibit C to Cole Declaration

TALKING POINTS: Community Forum public meeting, Ivar Theater, Los Angeles, CA—January 24, 1991

I've been asked to talk about the year (or so) of crisis at the National Endowment for the Arts, and what I think the agency did right and what I think went wrong.

This past fall the National Endowment for the Arts was reauthorized, and although the final bill was a compromise that did not fully please everyone or perhaps anyone, the agency received a three year lease on life. That's half of the good news. The other half is that the content restrictions in place in 1990 were replaced by some wise statesmen with language that places the question of obscenity with the courts.

There are two other major portions of our new bill which bear mentioning this evening. First of all, more money will be granted directly to state arts agencies—by mandate. Some people in the arts community think this means less money for artists or arts organizations, and I would just express my confidence in the states to use these additional funds in a wise, responsible manner that ensures the continued success of the arts in their states. This reprogramming means shifting some of our funds from different discipline programs to meet the increase in direct funding to the states, but together with our public and private partners, we will find the money necessary for support of excellent art and creativity. In fact, we'll have to call upon our own creativity to make it

happen, but ultimately, the best art will survive and prevail.

Second, there is a provision which states that we must take into account general standards of decency and respect for the diversity of the American people in our grantsmaking process. This so-called "decency standard" has quite a few people worried, but I should point out that it is couched in positive language rather than a negative standard. Congress consciously used the language of decency rather than indecency, and although I cannot speak for their motivation, it may have been a result of Congress's and our revulsion to the negative attacks on art.

We are addressing this problem by making sure that our panels and National Council on the Arts are composed of decent citizens, people who recognize the plurality of our society, respect individual dignity, spiritual values, and the rights of all groups and their cultural expressions. This is what being a decent American is all about, and the roots of such beliefs go back to Jefferson and Thomas Paine.

What does this all mean to artists, and what does this say about the question of censorship?

In the most general sense, the answer is that artists and organizations who apply to the National Endowment for the Arts will be judged on the basis of the criteria which have existed since the very beginning of this agency. As many of you know, our panels are asked to make recommendations on the basis of an applicant's demonstrated past success and the potential—as outlined in the application proposal—for

artistic excellence. That's always a tough call, a subjective one, but the peer panel system is the best way to make these decisions.

Now, a word about the panels, particularly in relationship to how they are composed and what role they play in the decision-making process. Nominations will continue to be solicited from all corners for artists, critics, administrators and other professionals in the arts, and all panels will include an lay person who does not make a living from the arts, but nevertheless has a serious interest in the arts. We decided to add a lay person to make the panels more representative of our patrons—the American taxpayers—and to make the panels more accountable. A lay person brings a different perspective to the table, asks different kinds of questions. I think the main advantage of this addition is that it will, in some cases, force the panels to explain in detail why a particular project should be funded. One thing we must do better is to explain why we fund particular works—what makes the proposal have the potential for excellence and/or access to the arts. As I mentioned before, we are optimistic that explanation of the decisions of decent men and women about their subjective evaluation of proposals will fulfill the so-called "decency standard."

I should also mention that while the panel recommendations are basic to our process, the National Council on the Arts will continue to have the role of oversight of all grants, future directions of policy and funding-decisions, and recommendations to the Chairman. On a few occasions, the Council may reverse a panel recommendation on a number of

grounds, and the Chairman will also continue to have the responsibility of running the agency and making the final decisions on all of these recommendations. I want to emphasize that while their may be disagreements from time to time about the potential for artistic excellence, I do not believe in using the Council or the Chairman as a way to abridge freedom of expression or control the content of the applications.

Finally, on this issue, I am grateful to the Members of Congress who worked out the compromise. Six, seven months ago we were teetering on the brink of something much worse. Republicans and Democrats hammered out a bill that removed content-based restrictions, extended the life of the agency for the next three years, and slightly increased the budget for our work.

We must all face the fact, however, that there are some problems that need attention. First of all, there is the continued impression among some Members of Congress and certainly a portion of the public that all that the arts are about is causing controversy for controversy's sake. We need to reach out, to explain, educate, inform, and include more of our citizens in the cultural life of their communities. That's priority one.

The extensive coverage this debate has received has caused a great deal of rancor. Artists are upset with politicians and the public for the seeming refusal to listen and furthermore the attempts to fetter freedom of expression; the politicians and the public are quite frankly pissed off at some artists for what they see

as an attack on values and morality. I feel that both sides must do the most difficult thing: to listen and respect the other person's opinion. We must learn to let the vigorous clash of ideas—that most basic of American democratic principles—decide the direction we as a nation will go, decide how we're to solve our problems and address the needs and concerns of the minority, and, indeed all people.

Art will continue to pose questions about ourselves. We must listen to those questions. There is something about the arts that presses issues forward; the artists are the watchers of our society, to use Kurt Vonnegut's phrase, they are the canaries in coal mines, telling us about the conditions of our world; artists are commentators on society, and they do push —sometimes in ways which may not give us comfort. But in so doing, they allows us to confront the issues of our day and hopefully resolve them.

So let us not rush to conclusions without confronting works we haven't seen. Let us listen to our artists, see the performances, read the books, go to the shows. And let our artists maintain their vigilance as watchers. We should value their contributions more than we do, for they help us discover ourselves.

Finally, we should keep our sense of humor and perspective when it comes to so-called controversial art.
JOLLY GREEN GIANT STORY

If there is any salvation of our society, it is to maintain our sense of humor. Reinhold Niebuhr called humor the prelude to faith, and laughter the beginning of prayer. So with humor, with humility,

with dedication to public service, we at the National Endowment for the Arts will continue our mission to promote excellence in the arts and access to that excellence.

Our priorities at the agency cut across the spectrum of the arts. In the coming year, we will turn our attention to several areas of concern, including arts education, access to the arts (particularly in rural and underserved areas), and inclusion of all forms of cultural expression in our funding schemes.

The ultimate goal of our efforts is to help create and sustain a citizenry that:

> recognizes and appreciates the life-enhancing values of all art forms;
>
> feels free to give expression to their own innate creativity and humanity through participation in the arts;
>
> provides active support for the arts in both the private and public realms.

To build this kind of stewardship of our nation's culture, we must begin by educating all Americans about the fundamental value of the arts in our lives. We will continue to do so through our regular programmatic areas, especially Arts in Education, and also through our advocacy efforts.

That's why I'm here tonight. Not only to tell you about the Arts Endowment and where we stand in January, 1991. But to listen—to the needs of Los Angeles. As part of our outreach efforts, we will hold

a series of public meetings across the country that will serve as community forums. We need to hear from you: what are your needs? What will make Los Angeles and the Southern California area a better place to live and work? How can we help build community here through the arts?

I look upon the upcoming question and answer period as an opportunity for you to tell me how we can help make a dream become reality. I am certain that all of you hope to see Los Angeles flower into a cultural oasis.

My hope for the discussion to follow and in community forums across the country in 1991 will be to try to encourage the development of a wide range of activities so that all may take an active part in the cultural life of their community with a broad view of helping bridge difference. I'm asking you, just as I will ask folks from other geographic areas, what do you want and need in terms of cultural activities to make your community a better place to live. How can we help facilitate a coming-together of the artistic community in Los Angeles, so that you can build unity here through the arts?

We've handled all of the controversy, the media, Congress, the public, the Right, the Left, and all the other pressures as best we could over the past year. Sure, we've made mistakes, but we've learned as well,

and we'll continuing learning. Tonight, let's take the first steps toward building consensus, partnership, community to make Los Angeles vibrant with a rich and varied artistic life.

Thank you.

Exhibit D to Cole Declaration

MB 3135-0087
Expiration Date 3/31/93

ADDENDUM E

ADDITIONAL TERMS & CONDITIONS FOR
ORGANIZATIONS RECEIVING SUPPORT
FOR SUBGRANTING
(Revised May 1991)

Because your grant involves subgranting with Endowment funds the following terms and conditions pertain to your grant in addition to the "General Terms" referenced in your grant award letter:

A. None of the funds included in your approved project budget for support of your subgranting activity can be used for the purpose of awarding subgrants until you receive written notification from the Endowment's Grants Office that your subgrant recommendations have been approved. This prohibition applies to the use of federal and nonfederal project funds.

B. No announcements of subgrants may be made prior to your receiving written notification from the Endowment that your subgrant recommendations have been approved.

C. Subgrant recommendations and related information must be submitted at least 60-calendar days prior to the grant end date. Failure to provide the necessary information within the required time frame will result in the Endowment withdrawing any funds remaining on your grant.

However, if more time is needed to complete the project or submit this information, you may request a time extension as long as it is received at least 60-calendar days prior to the grant end date.

D. The information you submit must be in the format outlined on pages three and four to these additional terms and conditions; contain the information identified below; and be sent to the program through which your grant was awarded:

- o grantee name/grant number/award amount;
- o a description of the direct grant project/ activity;
- o a description (limit to one paragraph) of the actual selection process (including dates of significant steps in the selection process) with any noteworthy issues raised highlighted;
- o a listing and/or description of the review criteria against which subgrant applications were evaluated;
- o the names and primary professional affiliations of panelists, jurors, others involved in making the subgrant recommendations;
- o identification of the number of applications received and the number of subgrants recommended;
- o a list of the specific subgrant recommendations including the subgrantee name, address (city and state only), the amount of

their subgrant, and a description of the project or activity being supported; and

- o a certification that you will require final reports from your subgrantees.

[NOTE: While not part of this submission, the Endowment may subsequently request the application materials received from the subgrant applicants now being recommended for funding.]

E. You may request and receive Endowment funds to support the administrative activities or costs identified in your approved project budget as being necessary to make subgrant recommendations (pre-award costs). These costs may include guideline publications, panel costs, etc. The amount requested, however, may not exceed 35% of the Endowment's award. No funds may be requested for the awarding of subgrants or for post-award administrative costs (such as monitoring subgrantee activity, reviewing final reports, etc.) until the Endowment has reviewed and approved, in writing, the subgrant recommendations.

F. Subgrant recommendations and related information are subject to review and approval by the Endowment's Chairman. Once the Chairman acts on the recommendations, the Grants Office will inform you, in writing, of the outcome.

G. If a subgrant recommendation is rejected, you may request that your grant project budget be reduced to exclude sufficient nonfederal funds

to support the rejected subgrant outside of the Endowment-supported project. Under no circumstance can an Endowment-supported project include funds to support a rejected subgrantee; this applies to both federal and nonfederal funds.

H. Amendment requests that involve changes to previously approved subgrantees will be reviewed by the Chairman. These changes must be submitted to the program through which your grant was awarded along with supporting material documenting the change.

The Endowment will do everything it can to assist you in complying with these requirements. We encourage you to contact the program through which your grant was awarded regarding timing questions and any other information related to the activity of the grant. For other questions, you may contact the Grants Office directly at 202-682-5403.

FORMAT FOR GRANTEES TO PRESENT SUBGRANT RECOMMENDATIONS & RELATED INFORMATION TO THE NATIONAL ENDOWMENT FOR THE ARTS

Grantees must use the following format when presenting specific subgrant recommendations and related information to the National Endowment for the Arts.

1. Grantee Name/Grant Number/Award Amount.

2. A description of the direct grant project/ activity.

3. A description (limit to one paragraph) of the actual selection process (including dates of significant steps in the selection process) with any noteworthy issues raised highlighted.

4. A listing and/or description of the review criteria against which subgrant applications were evaluated.

5. The names and primary professional affiliations of panelists, jurors, others involved in making the subgrant recommendations, for example:

John Smith	Artistic Director A.B.C. Dance Company Pittsburgh, Pennsylvania
Jane Brown	Executive Director X.Y.Z. Theater Los Angeles, California
Hank Gray	Musician/Composer Tampa, Florida

6. Identification of the number of applications received and the number of subgrants recommended, as follows:

Number of applications received total_____.
Number of subgrants recommended total_____.

7. A list of the specific subgrant recommendations (in alphabetical order) including the subgrantee name, address (city and state only), the amount of their subgrant, and a description of the project or activity being supported, as follows:

Grantee Name — Amount of Subgrant
Address (City and State)

Description of subgrant project or activity being supported.

8. I certify that _____ (name of grantee) will require final reports from subgrantees supported by this grant.

_____
(Signature of Authorizing Official)

Exhibit E to Cole Declaration

May 1990

Constitutional Analysis of the FY90 Appropriations Obscenity Language

Julianne Ross Davis
General Counsel
National Endowment for the Arts

The constitutionality of the 1990 appropriations language can be challenged on three levels. First of all, the phrase "may be considered obscene" may constitute a prior restraint because the decision as to what is and is not obscene can arguably be made on work prior to its creation. The Arts Endowment cannot refuse to fund an application merely because it sounds like the applicant might create something that might be considered obscene by some. This amounts to a prior restraint and is unconstitutional. In addition, the appropriations language may include works that are not obscene but merely indecent. Indecent speech is protected by the First Amendment and therefore, the phrase "may be considered obscene" may be void for vagueness as well.

The second phrase that may not pass constitutional muster is "in the judgment of the Endowment". Leaving the determination as to whether or not a work is or is not obscene with the Endowment lacks the appropriate due process safeguards. Ordinarily, when an individual's First Amendment rights are affected, there are procedural due process safeguards in place to ensure that a citizen's constitutional rights are protected. Specifically, that citizen is afforded a hearing and an opportunity to present his or her side of

the story along with evidence and arguments to a jury of peers. Along with that right are the requisite appellate rights. The Endowment is not a regulatory agency and has none of these procedural safeguards in place. Although Section 954 (h) of our enabling legislation does provide for a hearing, there are no due process safeguards built into that reference. Moreover, there are no appellate rights anywhere in our regulations or enabling legislation. It is the Endowment's opinion that the government does not want to create another unnecessary regulatory agency. This would require another bureaucracy with lawyers and hearings officers. The courts are better equipped to make these determinations.

The phrase "in the judgment of the Endowment" also creates an additional problem because the Supreme Court's definition of obscenity necessarily requires the application of community standards. The standard for determining whether something is or is not obscene is found in Miller v. California, 413 U.S. 15 (1973). The three-part test for obscenity is 1) does the work appeal primarily to the prurient interest? 2) Is it patently offensive? and 3) Does it lack serious artistic, literary, political or scientific value?

The first two prongs of the Miller case require the application of community standards. It is impossible for the Endowment to determine whether a particular work will offend local standards in one community, some communities or all communities. The Supreme Court noted this very difficulty in Miller when it stated:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should be or can be, fixed, uniform national standards of what precisely what appeals to the "prurient interest" or is "patently offensive". These are essentially questions of fact, and our nation is simply too big and too diverse for this court to reasonably expect that such standards could be articulated for all fifty states in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person applying contemporary community standards would consider certain materials "prurient" it would be unrealistic to require that answer to be based on some abstract formulation . . . . To require . . . a national "community standard" would be an exercise in futility. Id., at 30.

This statement was recently confirmed in Sable Communications v. FCC, 109 Sup. Ct. 2829 (1989). The Supreme Court allowed an FCC regulation prohibiting obscenity to stand but affirmed the necessity that the determination of obscenity be at the local community level. The court noted that the Miller

standards, including the contemporary community standards, apply to federal legislation and that possible purveyors of obscenity are subject to "varying community standards on the various federal judicial districts in which they transmit the materials." The court also noted that there is no "uniform national standards of obscenity."

Lastly, the phrase "including, but not limited to homo-eroticism, sadomasochism, sexual exploitation of children, or individuals engaged in sex acts . . ." may violate the Constitution for two reasons. First, the lead-in phrase "including, but not limited to" turns the test of obscenity to something much more subjective and may render the entire obscenity prohibition void for vagueness. In addition, the laundry list of depictions which are prohibited, with the possible exception of the phrase "sexual exploitation of children", in and of themselves are not necessarily obscene. Thus, the criteria has become too subjective and has strayed too far from the definition of obscenity outlined by the Supreme Court. This has created an instance where learned people of like mind could disagree on the application of the law.

Exhibit F to Cole Declaration

Exhibit F. John Frohnmayer, "Talking Points for 1st Amend. Congress, KC, MO"

[Exhibit F cannot be readily reproduced in a useful form in this format. Copies will be lodged with the Clerk of the Court.]

Exhibit G to Cole Declaration

National Endowment for the Arts [Seal omitted]
Washington, D.C. 20506

A Federal agency advised by the
National Council on the Arts

January 31, 1990

MEMORANDUM

TO: Theater Advisory Panel (Solo Performance Theater Artist and Mime Fellowship Section)

FROM: Jessica L. Andrews
Director
Theater Program

RE: Panel Meeting on February 22 & 23, 1990

Thank you for agreeing to serve on the Solo Performance Theater Artist and Mime Fellowship Section of the Theater Advisory Panel this year. We know that you have very busy schedules and really appreciate the time that you are giving to this process.

The material which follows this memo gives you the information that you will need before arriving in Washington. Even if you are a returning panelist, please read this carefully as there may have been some changes made.

The range and diversity of performance that occurs throughout the country is exhilarating. I am certain that this year's Solo Performance Theater Artist and Mime Fellowship review will be as productive as past ones, and that you will emerge from the experience pleased for having contributed to this rigorous and honorable process. Your participation is vital to us, and deeply appreciated by the profession. It is public service of a high order.

A few reminders: Please don't fall behind in the reading; do make notes; do call Eleanor Moncure whenever you have questions about applications (202/ 682-5425). It will save time at the table if some questions can be answered ahead of time.

The entire staff is looking forward to seeing you on February 22. Thanks again for participating.

INTRODUCTION

I'll begin by restating the Theater Program's mission as expressed in our Guidelines:

> The purpose of the Theater Program is to support the advancement of the art form. To this end, the Program encourages work in all forms and styles. It provides financial assistance for the creation of art works by professional artists, primarily in companies; for the development of the most talented individual artists; and for activities that improve the environment in which artistic excellence can occur.
>
> The Program takes a national perspective on the needs and condition of the theater field and attempts to plan for developments in future years.

The principal goals of the Program's financial assistance categories are:

- to improve the quality of theater art.
- to identify examples of the highest quality work to which all can aspire.
- to encourage free artistic expression.
- to expand the range of possibilities within which theatrical creativity functions.
- to augment opportunities for talented artists to work together.
- to develop new generations of talented artists.
- to make professional theater more widely available in areas not presently served.

A fundamental emphasis of the Program is to reward the highest artistic quality in whatever form it is found, without tilting in any one aesthetic direction. The Program seeks the widest possible boundaries for theater in order to support the best the art offers in all its varied forms. Most applications are submitted by artists and organizations working in familiar ways. But there are many other kinds of possible applicants including mime companies, puppet theaters, and circuses. This diversity is encouraged and welcomed.

THE PANEL'S RESPONSIBILITIES

This section of the Advisory Panel is responsible for recommending grant awards in the Program's Solo Performance Theater Artist and Mime Fellowship category. All panel recommendations are based on a fully competitive application review, and are not meant to focus on any particular taste or aesthetic. Rather, these recommendations should reflect a consensus decision that recognizes the highest artistic quality in whatever form it presents itself.

We are not secretive, and do everything possible to let applicants know what the Panel was thinking in recommending—or not recommending—their fellowship. To do that fairly, we return to our panel notes throughout the year. An off-the-cuff comment by the panelist—made weeks or months after the meeting—may not accurately match the full panel's reasons for voting in a particular way. So to avoid confusion and honor everyone's confidentiality, please keep the closed sessions entirely private. We understand how difficult this can be when you are con-

fronting a close colleague or long-standing friend who is concerned about a particular grant. We have all been through that very awkward experience, but it really is best to say that you don't remember all the specifics, and that the applicant should call the Theater Program for details. All material that we provide to you in advance of the meeting is, however, solely for that purpose and should not be shown to others, copied, or converted to any other use.

CONFLICT OF INTEREST

Appointment to the Panel is an invitation to statesmanship. The integrity of the process must be protected, not only by the Endowment's conflict of interest rules, but also by your own sense of propriety. No panelist is permitted to discuss an applicant who has a current financial arrangement with the panelist or panelist's organization; has a future financial arrangement; or has recently completed an arrangement.

Obviously, the entire process puts great pressure on you, the panelist, to rise above your own particular interests or tastes—to represent the field as a whole. Panelists are chosen with aesthetic, cultural, and geographic diversity in mind, so that the Panel as an entity will be fair to the entire field while still imposing a strict standard of excellence.

As a public agency, the Endowment must ensure that due process is followed, as established by the published Guidelines. Accordingly, strict conflict of interest rules are enforced; any criteria other than those published are excluded from consideration; and we take great pains to provide you with accurate information. Please read the Standards of Conduct document (which follows this memo) very carefully.

Following the Standards of Conduct document in this book is a Conflict of Interest documentation form. Please fill it out and return this to us as soon as possible. You must sign it again at the meeting.

SOURCES OF INFORMATION

Only three sources of information may be brought to bear on the Panel review of applications. First, of course, is the application itself and its supporting materials. Second, and most important, is your own expert knowledge of the applicants under review. Third are the site reports. As always, gossip and rumor play no role in this process.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT
OF CALIFORNIA

No. CV 90-5236 AWT (Kx)

KAREN FINLEY, JOHN FLECK, HOLLY HUGHES, TIM MILLER, AND NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS

v.

NATIONAL ENDOWMENT FOR THE ARTS, AND JOHN E. FROHNMAYER, IN HIS OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS

DEFENDANTS' STATEMENT OF GENUINE ISSUES OF MATERIAL FACT IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Pursuant to Local Rule 7.14, defendants hereby file their statement of genuine issues of material fact in opposition to the plaintiffs' motion for summary judgment on Count VI of the Amended Complaint, which challenges the constitutionality of 20 U.S.C. § 954(d). Although there are fundamental issues of disputed fact, as explained below, the defendants nonetheless agree that there are no "genuine issues" of fact precluding summary resolution of Count VI pursuant to Fed. R. Civ. P. 56 because the plaintiffs' factual assertions are unsupported.

In their Memorandum Of Points and Authorities and their Statement of Uncontroverted Material Facts, the plaintiffs repeatedly assert that the National Endowment for the Arts ("NEA") has adopted a policy of conducting grant-by-grant assessments of whether an applicant's work satisfies "general standards of decency" and demonstrates "respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d). In fact, the NEA has no such policy, but has fulfilled its obligation to implement § 954(d) by adopting various practices to diversify the peer panels that initially review and make recommendations on grant applications. See 20 U.S.C. § 959(c). The variety of cultural, artistic and ethnic views on each panel ensures that the panels' recommendations inherently will reflect the variety of values and sensibilities that exist throughout society.

These factual differences need not be tried, however, because there is no "genuine issue" about how the NEA has implemented the statute. Plaintiffs' description of the NEA's policy is factually unsupported; none of their declarations or exhibits purports to provide a definitive description of the NEA's practices, but simply assumes that the agency will "grant or withhold government benefits" based on the agency's assessment of the "decency" of an applicant's work. See Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment at 1.

Although no genuine issues of fact preclude summary resolution of Count VI, there are several other uncontrovertible facts relevant to the resolution of plaintiffs' motion for partial summary judgment and defendants' motion for judgment on the pleadings as it

relates to Count VI of the Amended Complaint. Those additional facts are set out below.

STATEMENT OF FACTS

1. In November, 1990, Congress substantially amended the NEA's enabling legislation. One of those amendments directed the Chairman to establish regulations and procedures to ensure that:

> artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. § 954(d) (emphasis added).

2. Since § 954(d) was amended, three of the five plaintiffs challenging this provision (Holly Hughes, Tim Miller, and the National Association of Artists' Organizations ("NAAO")), have applied for and received NEA grants totalling $51,250. Exhibits A, B, C, and D (grant letters).[1]

3. NEA panelists are not directed to make a determination about the decency of the art work that the applicant has done or proposes to do, apart from their judgment of the proposal's artistic merit. Rather, as the guidance provided to panelists makes clear, the Endowment expects that each panelist will base his or her recommendation only on the artistic

[1] Plaintiff John Fleck has applied for a FY 1992 grant from the Endowment, see Exhibit E, and plaintiff Tim Miller has applied for another grant in FY 1992. See Exhibit F. Karen Finley, the only plaintiff who has not applied directly for a grant since § 954(d) was amended, received indirect NEA support in FY 1991. See Exhibit G.

merit and excellence of each application. Exhibit H, ¶ 4 & Attachment 1; Exhibit I; Exhibit J at 33-34.

4. The Endowment has not undertaken any policy, practice or procedure to review ongoing grants for compliance with § 954(d), nor does it require subgrantees to make decency assessments of subgrantees' art work before awarding subgrants. Exhibit L, ¶ 7(b).

6. Pursuant to 20 U.S.C. § 959(c), grantees are required to submit reports on Office of Management and Budget forms, which include financial statements, a general description of the work, and in some cases, a copy of the product. 20 U.S.C. § 959(d)(2); Exhibit M, Attachments 1-3. These reports are reviewed by Program Offices within the NEA to determine whether grantees carried out the activities and projects for which the grant funds were awarded, and whether they did so with an acceptable level of quality. Exhibit M, ¶ 7. The Endowment does not have any policy, procedure or practice of using these reports to assess compliance with the "decency" clause of § 954(d). Id. at ¶ 12.[2]

[2] In their declarations, the plaintiffs additionally refer to three examples of the Endowment's alleged harassment of grantees for addressing controversial matters in their grant projects which, they then argue, demonstrate how the "decency" provision is or could be abused by the NEA. See Finley Decl. ¶ 12; Murphy Decl. ¶ 16. The plaintiffs misstate the facts regarding all three examples, as to two of which they wholly lack personal knowledge. Most importantly, none of the examples cited involved agency action taken pursuant to the "decency" provision or any other part of § 954(d). Because these examples are wholly unrelated to the issues before the Court, they are not addressed in detail here. However, an accurate record of the agency's actions concerning these three

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

LOURDES G. BAIRD
United States Attorney

STAN BLUMENFELD
Assistant United States Attorney

/s/ THEODORE C. HIRT/MMB
THEODORE C. HIRT

/s/ MARK W. BATTEN
MARK W. BATTEN
U.S. Department of Justice
Civil Division, Rm. 918
901 E Street, N.W.
Washington, DC 20530
(202) 514-1285
Attorneys for Defendants

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grants may be found in Exhibit M ¶¶ 13-18, and Exhibit H ¶ 11.

DECLARATION OF RANDOLPH McAUSLAND

I, Randolph McAusland, do hereby declare as follows:

1. I am the Deputy Chairman for Programs at the National Endowment for the Arts ("NEA"). I have held this position since June 1990. My responsibilities include oversight of the peer panel review process by which recommendations for funding are made in the Theater and 13 other Endowment programs. In that regard, the Chairman delegated to me the responsibility for initially reviewing and approving the composition of peer review panels.

2. In November 1990, following the enactment of the so-called "decency" provision of the NEA's enabling legislation (20 U.S.C. sec. 954(d)), the Chairman, with the concurrence of the National Council on the Arts, determined that the NEA would implement that provision by ensuring that the peer review panels represent a variety of geographical areas, aesthetic views, professions areas of expertise, races and ethnic groups, and gender, and include a lay person. This method of implementation was based on the conclusion that the recommendation of peer review panels comprised of panelists with diverse backgrounds inherently would reflect the diverse values and sensibilities of the American public.

3. Consistent with this decision and with the provision of the NEA's enabling legislation governing peer review (20 U.S.C. section 959(c)), the Endowment has implemented steps to ensure that panels have a diverse composition. These include such goals as ensuring that most panels consist of at least nine

persons, including residents of each of six geographic regions; that panels are evenly split between men and women; that 20-25 percent of panelists are members of identifiable racial minority or ethnic groups; that each panel is composed of persons with a variety of aesthetic perspectives and occupations within the arts (i.e., critics, academics, artists, presenters); and that each panel include one lay person. I personally review all proposed panels to ensure that they are sufficiently diverse. I reject approximately one out of five proposed panels for inadequate diversity.

4. When a panel convenes to review applications, either the Chairman or I address panel members as part of their orientation. Among other things, I explain section 954(d)(1) and the NEA's implementation of it. I typically begin by reading that provision, which states in relevant part:

> artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

I then explain that the NEA interprets this provision as a whole; that is, that artistic excellence and merit are the criteria upon which grant awards should be based. Therefore, I explain, each panelist should be guided ultimately by his or her conclusions as to the artistic merit and excellence of a proposed grant project or work, and that the NEA, by ensuring diverse membership on the panels, had fulfilled its mission under the statute of "taking into account" diverse standards and values. Because the statute must be read as a whole, neither the Chairman nor I ever instruct a panel to make a separate determination as to whether an application is decent or respectful.

5. Attachment 1 to this declaration consists of excerpted pages from the orientation of the panel that reviewed applications to the 1991 Theater Program Professional Companies category. The Chairman addressed this panel. His remarks are typical of the presentation we both make concerning section 954(d).

6. In my capacity as Deputy Chairman for Programs, I also am responsible for overseeing the drafting of Guidelines for each funding category within my jurisdiction. A few of these Guidelines, including those for the Solo Performance Fellowship grants, state that the NEA will consider an applicant's "body of work" in making funding decisions. Applicants typically satisfy this requirement by listing the titles of their projects, the places they have performed or exhibited, the dates on which they wrote, performed or exhibited the projects, and providing similar information in their applications.

7. This information is limited to projects, performances or work within the relevant field. In other words, if an individual who has applied for a playwright fellowship in the Theater program also paints, the panel considering playwright fellowships does not review the applicant's "body of work" as a painter.

8. Panels consider information pertaining to an applicant's relevant "body of work" to assess the applicant's standing and significance in the relevant field. Based upon the statute taken as a whole, there is no policy or practice of reviewing the content of an applicant's "body of work" to make a determination as to whether the applicant has produced "indecent" or "disrespectful" art.

9. Similarly, when site visitors prepare site visit reports for the review panels, they are primarily concerned with the performance they reviewed. Site visit reports typically discuss an applicant's "body of work" only in terms of where the applicant has performed, the works that he or she has performed, how the works were received, and the applicant's reputation. The Endowment does not solicit an opinion as to whether the applicant's "body of work" contains work that is or could be considered indecent.

10. Charlotte Murphy, Executive Director of plaintiff National Association of Artists' Organizations ("NAAO"), states in paragraph 16 of her declaration that the so-called "'decency' amendment has also caused the NEA to monitor the use of grants in ways that are chilling artistic freedom and intimidating grant recipients." However, I am aware of no Endowment policy or procedure which requires the NEA to monitor on-going or completed grants for compliance with the "decency" language in section 954(d); the monitoring which is done (to assure compliance with the terms and conditions of the grant) is described more fully in the declaration of Laurence Baden, Deputy Chairman for Administration.

11. Additionally, as an example, Ms. Murphy states that the NEA "investigated the use of grant funds by another NAAO member, a gallery in San Diego, for a public art project whose theme was police brutality." The grantee to whom Ms. Murphy refers is Installation Gallery. As Deputy Chairman for Programs, I am familiar with the NEA's actions regarding this grantee. The Endowment received an inquiry as to whether the grantee had misused grant funds. Upon review of the grantee's final report, we confirmed that it had used the funds to support a

project that corresponded to that described in its application and grant letter, and that nothing improper had occurred. Neither the inquiry received by the NEA nor the agency's conclusion regarding this grantee were related in any way to any concern that the grantee's project was "indecent" or "disrespectful" or that it failed to conform to section 954(d).

I swear upon penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

1/2/92
DATE

/s/ RANDOLPH MCAUSLAND
RANDOLPH MCAUSLAND

Attachment 1

Excerpt of 1991 Theater Program
Professional Companies Panel

Introductory Remarks

Speaker: This is John Frohnmeyer, Chairman of the National Endowment for the Arts.

(Inaudible)

(Introductions)

Speaker: I'm sorry for the conditions but at least the weather is nice outside. I hope we get a break sometime. I'm here for just a couple of reasons. One of them is just to thank you for being here and giving your time. Doing the Endowment's work is critical, as I think all of us appreciate that the panels do the hardest process and you're it, and I thank you for your time and your effort to do this work.

The second thing is just to run briefly through the legislation that governs us this year and answering questions you might have on it. It says that you make your decisions on the basis of artistic merit and artistic quality, taking into consideration the general standards of decency and the diverse values of

the American people. What that means in terms of how we have interpreted that language is that you're it. We put together a panel that broadly represents diverse areas of the country, both (inaudible) cultural background of the country, and you bring to the table those values that the statute states. I don't really have any more to say about it than that unless you want to talk about it.

The third thing, if you wouldn't mind just taking a couple of minutes with me, I would just like to hear what's on your mind individually or collectively, from what you see going on out in the world of theater where you are. What the major issues are or something that we from the national perspective, can help with.

SECOND DECLARATION OF CHARLOTTE MURPHY

I, Charlotte R. Murphy, do hereby declare as follows:

1. I am the Executive Director of the National Association of Artists' Organizations (NAAO), which is a plaintiff in this case.

2. Among NAAO's members are individuals and organizations which have applied for NEA grants and have been denied grants since the "decency" restriction being challenged in this lawsuit took effect.

3. Those NAAO members which have been denied grants since the restriction took effect have no way of knowing whether their denials were based in whole or in part on considerations of "decency" because the denial letters issued by the NEA do not state the reason for the denial.

Signed under penalties of perjury this 24th day of January, 1992.

/s/ CHARLOTTE R. MURPHY
CHARLOTTE R. MURPHY

In the Supreme Court of the United States

No. 97-371

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

Filed: Nov. 26, 1997

ORDER GRANTING CERTIORARI

The petition for a writ of certiorari is granted. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before, 3 p.m., Friday, January 9, 1998. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 6, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 6, 1998. Rule 29.2 does not apply.

Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

No. 97-371

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The National Foundation on the Arts and the Humanities Act authorizes the National Endowment for the Arts (NEA) to make monetary grants-in-aid that enable qualifying groups and individuals to undertake a variety of projects related to the arts. The Act provides that, when issuing regulations and establishing procedures governing the grant application process the Chairperson of the NEA shall ensure that

> artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. 954(d)(1).

The question presented in this case is whether the statutory direction that the Chairperson shall "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" is unconstitutional on its face under the First Amendment and the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioners are the National Endowment for the Arts and Kathryn Higgins, in her official capacity as Acting Chairperson of the National Endowment for the Arts. Respondents are Karen Finley, John Fleck, Holly Hughes, Tim Miller, and the National Association of Artists' Organizations.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 100 F.3d 671. The memorandum opinion of the district court (Pet. App. 48a-89a) is reported at 795 F. Supp. 1457. The order of the court of appeals denying the petition for rehearing (Pet. App. 90a-95a) is reported at 112 F.3d 1015.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1996. A petition for rehearing was denied on May 1, 1997. On July 23, 1997, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 29, 1997. The petition for a writ of certiorari was filed on August 29, 1997, and was granted on November 26, 1997 (J.A. 87). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution, and relevant provisions of the National Foundation on the Arts and Humanities Act, 20 U.S.C. 951 *et seq.*, are reproduced at App., *infra*, 1a.

STATEMENT

A. Federal Funding of the Arts

1. Congress created the National Foundation on the Arts and the Humanities to "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States." National Foundation on the Arts and the Humanities Act of 1965 (NFAH Act), Pub. L. No. 89-209, § 4(b), 79 Stat. 846, as amended, 20 U.S.C. 953(b). Congress organized the NEA as a part of the Foundation and directed the NEA to "establish and carry out a program of * * * grants-in-aid" to qualifying applicants. *Id.* § 5(a) and (c), 20 U.S.C. 954(a) and (c). Those grants-in-aid, which are distributed on a limited basis under selective criteria, are intended to support "groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts," in enumerated categories of artistic productions, projects, and workshops. See *id.* § 5(c), 20 U.S.C. 954(c).

The NFAH Act originally identified five such categories. See § 5(c), 79 Stat. 846-847. Since 1965, Congress has modified and enlarged the categories to include the following:

> (1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;

> (2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons;
>
> (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;
>
> (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;
>
> (5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts;
>
> (6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;
>
> (7) programs for the arts at the local level;
>
> (8) projects that enhance managerial and organizational skills and capabilities;
>
> (9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and
>
> (10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

See NFAH Act § 5(c)(1)-(10), 20 U.S.C. 954(c)(1)-(10); see also *id.* § 5a, 20 U.S.C. 954a (providing for projects relating to arts education). The Act defines many of the relevant statutory terms, including "the arts," "production," "project," and "workshop." *Id.*, § 3(b), (c), (d), and (f), 20 U.S.C. 952(b), (c), (d), and (f).

Congress necessarily vested the NEA with considerable discretion in the administration of the grants-in-aid program, which depends on a case-by-case evaluation of applications, is subject to available appropriations, and can provide funding to only a small fraction of the applicants who seek public support. Congress has authorized the Chairperson of the NEA "to prescribe such regulations as the Chairperson deems necessary governing the manner in which the Chairperson's functions shall be carried out." NFAH Act § 10(a)(1), 20 U.S.C. 959(a)(1). The Chairperson has codified regulations governing certain agency operations, see 45 C.F.R. Pt. 1150, but sets forth most of the guidance on the grants-in-aid application and selection process through more informal means, such as application guidelines, which are provided on request to grant applicants.[1]

2. Since 1965, Congress has occasionally amended the NFAH Act to provide, among other things, legislative guidance with respect to the administration of the grants-in-aid program. The 1990 Amendments, which made a number of revisions to the Act, are of particular interest in this case. See Arts, Humanities, and Museums Amendments of 1990 (1990 Amendments), Pub. L. No. 101-512, 104 Stat. 1960.

a. Before 1990, the Chairperson made the ultimate decisions on grant applications, see NFAH Act § 5(c), 20

[1] Copies of the NEA's application guidelines for fiscal year 1999 (NEA FY 1999 Application Guidelines) have been lodged with the Clerk of the Court.

U.S.C. 954(c) (1988), after receiving the recommendations of a 26-member National Council on the Arts (Council), see *id.* § 6, 20 U.S.C. 955 (1988), and with the optional utilization of experts, including peer review panels, see *id.* § 10(a)(4), 20 U.S.C. 959(a)(4) (1988).

The 1990 Amendments modified the provisions governing the use of experts and consultants by generally requiring the Chairperson to "utilize advisory panels to review applications, and to make recommendations to the National Council on the Arts." NFAH Act § 10(c), 20 U.S.C. 959(c). The 1990 Amendments also directed the Chairperson to issue regulations and establish procedures to ensure that those panels reflect "diverse artistic and cultural points of view" and include "representation of lay individuals who are knowledgeable about the arts." *Id.* § 10(c)(1) and (2), 20 U.S.C. 959(c)(1) and (2). The 1990 Amendments also modified the procedures for formal approval of grant applications, specifying that although the Chairperson retains the final authority to approve a grant application, she may not approve an application with respect to which the Council has made a negative recommendation. *Id.* § 6(f), 20 U.S.C. 955(f).

b. Until 1990, Section 5(d) of the NFAH Act simply provided as follows:

> No payment may be made to any group under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations and procedures established by the Chairperson.

20 U.S.C. 954(d) (1988).

The 1990 Amendments modified Section 5(d) to state in relevant part as follows:

> No payment shall be made under this section except upon application therefor which is submitted to the

National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—

> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
>
> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. * * *

20 U.S.C. 954(d).

The 1990 Amendments were prompted in part by public objections to certain controversial artistic projects that had received NEA funding. The objections focused on a career retrospective exhibit of Robert Mapplethorpe's works, which included homoerotic photography, and an exhibit (funded by a sub-grant to a visual arts center) that included Andres Serrano's "Piss Christ," a photograph of a crucifix immersed in the artist's urine. See, *e.g.*, 135 Cong. Rec. 9788-9789, 10,323-10,325, 14,431-14,433 (1989).

In response to that controversy, Congress in 1989 established an Independent Commission to review the NEA's grant-making procedures, including its panel system, and to consider whether the standards for public funding of the arts should be different from the standards for private funding of the arts. See Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. No. 101-121, § 304(c)(1), 103 Stat. 742. The Commission recommended against amending the Act to impose specific restrictions on the content of works of art supported by the

NEA. See Independent Commission, *A Report to Congress on the National Endowment for the Arts* 89-91 (Sept. 1990). Instead, the Commission recommended that Congress: (1) reform the NEA grant-making structure and process, including the composition, role, and operation of the Council and advisory panels (see *id.* at 61-77); and (2) reaffirm, in the statutory declaration of purposes, that the NEA "serves all of the people rather than artists and art institutions alone, that it must be aware of the nature of public sponsorship and that it reflects the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us" (*id.* at 91; see *id.* at 59-61).

Congress's amendment of Section 5(d) of the NFAH Act, which followed the receipt of the Independent Commission's report, reflected a compromise among various perspectives on whether and how to impose greater control over the grants-in-aid award process. See, *e.g.*, 136 Cong. Rec. 28,620-28,677 (1990) (House debates on proposed amendments); *id.* at 29,233-29,244 (same); *id.* at 33,443-33,478 (Senate debates on proposed amendments). One proposal, offered by Representative Crane, would have virtually eliminated individual funding decisions by the NEA. *Id.* at 28,645-28,648. That proposal was rejected by the House of Representatives by a vote of 361 to 64. *Id.* at 28,656-28,657. Another proposal, offered by Representative Rohrabacher, would have placed explicit prohibitions on the funding of certain activities. It would have provided, in pertinent part, that none of the funds available to carry out the Act could be used "to promote, distribute, disseminate, or produce matter that has the purpose or effect of denigrating the beliefs, tenets, or objects of a particular religion," or "of denigrating an individual, or group of individuals, on the basis of race, sex, handicap, or national origin." *Id.* at 28,657. That proposal, too, was rejected by

the House of Representatives, by a vote of 249-175. See *id.* at 28,663-28,664.

The compromise amendment of Section 5(d)(1), quoted above, was accompanied by the inclusion of a provision barring the funding of works that had been judicially determined to be obscene. NFAH Act §§ 3(j), 5(d)(2) and 5(*l*), 20 U.S.C. 952(j), 954(d)(2) and (*l*).[2] In accordance with the Independent Commission's recommendations (see pp. 6-7, *supra*), Congress also amended the Act's declaration of findings and purpose to provide, *inter alia*, that "[t]he arts and the humanities belong to all the people of the United States" and "reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons," NFAH Act § 2(1) and (6), 20 U.S.C. 951(1) and (6), and that in making funds available for the advancement of the arts:

> Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.

[2] In the 1989 Appropriations Act, Congress had enacted a provision barring the use of appropriated funds for projects that, in the judgment of the NEA, may be considered to be obscene, including "depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." § 304(a), 103 Stat. 741. The Independent Commission recommended that the NEA not be charged with making judgments regarding obscenity and that such determinations be left to the courts. See *Report* at 87-89. The obscenity provisions of the 1990 Amendments implemented that recommendation.

NFAH Act § 2(5), 20 U.S.C. 951(5).

3. In recent years, Congress has restricted the availability of federal funding primarily to qualifying organizations and state arts agencies. See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 329, 111 Stat. 1600 (fiscal year 1998 appropriations). The NEA currently provides federal funding through grants-in-aid to organizations that propose specific projects in four categories: Heritage & Preservation; Education & Access; Creation & Presentation; and Planning & Stabilization. See NEA FY 1999 *Grants to Organizations*: Application Guidelines 3, 10-21 (Dec. 1997). The NEA also enters into Partnership Agreements with State Arts Agencies that provide funding to support state arts programs, which foster artistic creation, appreciation, and education, particularly in under-served communities. See *id.* at 23. The NEA distributes funds through Leadership Initiatives that significantly advance the arts, such as projects that tell the American story at the Millennium. See *ibid.* Finally, the NEA provides an extremely limited number of grants-in-aid to individuals through Literature Fellowships and through what are effectively lifetime achievement awards under the American Jazz Masters Program and National Heritage Fellowships in the Folk and Traditional Arts. See *id.* at 24.

B. The Current Litigation

1. The four individual respondents in this case had filed applications for federal grants-in-aid under the NEA's Solo Theater Artists Category at the time that Congress was considering the 1990 Amendments.[3] The NEA denied

[3] As a consequence of congressional action and agency reorganization in 1995, the NEA no longer provides funding for that category. Copies of the NEA's FY 1992 Application Guidelines for that program have been lodged with the Clerk of the Court.

their applications, and they brought suit in district court, alleging, among other things, that the NEA had violated the First Amendment and the NFAH Act by denying their applications on political grounds. After Congress enacted the 1990 Amendments, the artists' association joined the individual respondents in an amended complaint alleging that Section 5(d)(1)—which provides for "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public"—facially violates the First and Fifth Amendments. See Pet. App. 48a-49a, 52a-56a.

2. The government moved for judgment on the pleadings with respect to the individual respondents' claims relating to the government's denial of their grant applications. The district court denied the government's motion except in one minor respect, Pet. App. 56a-69a, and the government and the individual respondents ultimately settled those claims. At the same time that the government moved for judgment on the pleadings, respondents moved for summary judgment on their facial constitutional challenge to Section 5(d)(1). The district court granted that motion and enjoined the NEA from enforcing the language added by the 1990 Amendments. See *id.* at 69a-89a.[4]

The district court began by rejecting the government's construction of Section 5(d)(1). The government had argued that Section 5(d)(1) did not necessarily require the Chairperson, in evaluating each grant application, ex-

[4] The district court rejected the government's argument that respondents lacked standing to bring this suit. Pet. App. 70a-74a. The court stated that two of the individual respondents (Hughes and Miller) satisfied Article III standing requirements because they had received NEA grants at the time of the suit and they claimed that Section 5(d)(1) had restricted their expressive conduct. The court held that the artists' association, which included NEA applicants and grant recipients among its members, also had standing. *Id.* at 72a-74a.

pressly to consider whether the proposed project or work of art would reflect "general standards of decency" and "respect for the diverse values and beliefs of the American public." See Pet. App. 74a-75a. The government specifically cited the NEA's determination that it could satisfy Section 5(d)(1) by structuring the grant selection process, including the provision for diverse composition of advisory panels, so that general standards of decency and respect for diverse beliefs and values would be implicitly reflected in the consensus judgments of the decisionmakers. *Id.* at 74a-76a. The court found that interpretation impermissible, ruling that Congress had indicated that "'decency' and 'respect' for diverse beliefs *are* factors to be considered in determining 'artistic merit,'" *id.* at 75a, and that those factors must therefore receive explicit consideration, *id.* at 76a.

Turning to the constitutional arguments, the district court first ruled that Section 5(d)(1) violates the Due Process Clause of the Fifth Amendment, finding that the requirement that the Chairperson take into account "general standards of decency" is impermissibly vague. Pet. App. 76a-78a. According to the court, "the decency provision fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion." *Id.* at 78a. The court also concluded that Section 5(d)(1) violates the First Amendment. *Id.* at 88a. The court reasoned that "government funding of the arts is subject to the constraints of the First Amendment," *id.* at 87a, that Section 5(d)(1)'s "decency and respect" provision "clearly reaches a substantial amount of protected speech," *id.* at 88a, and that Section 5(d)(1) therefore "violates the First Amendment for overbreadth and cannot be given effect," *ibid.*

3. The government appealed the district court's grant of partial summary judgment on respondents' claims that

Section 5(d)(1), on its face, violates the First Amendment and the Due Process Clause. A divided court of appeals affirmed "essentially for the reasons stated by the district court." Pet. App. 3a. Like the district court, the court of appeals rejected the government's construction of Section 5(d)(1). *Id.* at 7a-16a. The court of appeals concluded that Section 5(d)(1) requires the Chairperson, National Council, and panels to

> examine each grant application to determine if it comports with "general standards of decency" and shows "respect for diverse beliefs and values" as they subjectively understand these terms.

Id. at 17a. Based on that construction, the court ruled that Section 5(d)(1) is unconstitutional. *Id.* at 17a-27a.

The court of appeals concluded that Section 5(d)(1) is void for vagueness under the First Amendment and the Due Process Clause of the Fifth Amendment. Pet. App. 15a-19a. It ruled, primarily on the basis of this Court's decision in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which rejected a vagueness challenge to a noise ordinance, that grant limitations are subject to vagueness principles. Pet. App. 15a. The court of appeals then concluded that the phrase "decency and respect for the diverse beliefs and values of the American public" is "inherently ambiguous" and "impossible to define." *Id.* at 17a-18a. The court stated:

> Since it is not susceptible to objective definition, the "decency and respect" standard gives rise to the danger of arbitrary and discriminatory application. It grants government officials power to deny an application for funding if the application offends the officials' subjective beliefs and values. Inevitably, NEA's decision not to fund a particular artist or project as indecent or disrespectful will depend in part on who is judging the application and whether that official agrees with the artist's point of view.

Id. at 18a-19a (footnote omitted). The court concluded that, "[w]here First Amendment liberties are at stake, such a grant of authority violates fundamental principles of due process." *Id.* at 19a. The court, however, saw no similar problem with applying Section 5(d)(1)'s "artistic excellence" and "artistic merit" criteria, reasoning that the relevant "decision makers possess an expertise in determining 'artistic excellence and artistic merit' that will guide their application of those criteria." *Id.* at 19a n.18.

The court of appeals recognized that its holding that Section 5(d)(1) "is unconstitutionally vague effectively disposes of this case." Pet. App. 20a. The court nevertheless stated that "the First Amendment's prohibition on content- and viewpoint-based restrictions provides an alternate ground for [its] decision." *Ibid.* (footnote omitted). The court of appeals rested its analysis in that respect on the premise that the government may not impose content-based restrictions on protected speech unless the government demonstrates that the restrictions advance a compelling interest and are narrowly tailored to serve that interest. *Ibid.*

The court of appeals stated that the "presence of government funding alters this framework somewhat," because "[t]he government may make content-based choices 'when it is the speaker or when it enlists private entities to convey its own message.'" Pet. App. 21a (quoting *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995)). The court noted that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Ibid.* (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991)). The court nevertheless concluded that "[g]overnment

funding does not invariably justify government control of the content of speech." *Ibid.*

The court of appeals stated that "*Rust* and *Rosenberger* identify two related contexts in which the government may subsidize speech only if it does so in a way that is viewpoint-neutral." Pet. App. 22a. According to that court:

> Neutrality may be required because the area is a "traditional sphere of free expression," *Rust*, 500 U.S. at 200, or because the government has declared its intention to "encourage a diversity of views from private speakers." *Rosenberger*, * * * 115 S. Ct. at 2519.

Ibid. The court of appeals concluded that "[b]oth approaches support the district court's conclusion that government funding of the arts, in the circumstances of this case, must be viewpoint-neutral." *Ibid.*

The court of appeals reasoned that "the arts, no less than the university, are 'at the core of a democratic society's cultural and political vitality'" and that "the NEA's purpose is to support a diverse array of artistic expression." Pet. App. 22a (quoting the district court's decision, *id.* at 81a). The court further concluded that Section 5(d)(1)'s "decency and respect" provision imposes impermissible viewpoint discrimination on grant applicants. *Id.* at 26a. The court of appeals ruled that, "[b]ecause the government has made no attempt to articulate a compelling interest served by the provision, [Section 5(d)(1)] cannot survive strict scrutiny." *Ibid.*

4. Judge Kleinfeld dissented. Pet. App. 27a-47a. He recognized that "[a]rtists, and for that matter, non-artists, are constitutionally entitled to express themselves indecently and disrespectfully toward the beliefs and values of as much of the American public as they like." *Id.* at 28a. He concluded, however, that while the First Amendment

prohibits censorship of indecent expression, it does not require the government to fund such speech. *Id.* at 29a.

Judge Kleinfeld stated that, when the government administers a grant program for the arts, its power to "consider content and viewpoint depends on whether the money it gives out is generally available to all who meet some basic standard, or whether it is a prize given to a select few." Pet. App. 29a. In his view, when the government awards artistic grants on a selective basis, it must inevitably draw distinctions among the applicants based on the government's objectives in providing the financial subsidy. See *id.* at 29a-35a. Hence, it may properly discriminate "by content and viewpoint." *Id.* at 35a-36a. He accordingly rejected the majority's conclusion that Section 5(d)(1) resulted in impermissible viewpoint regulation.

Judge Kleinfeld also rejected the majority's conclusion that Section 5(d)(1) is void for vagueness. Pet. App. 38a-41a He acknowledged that Section 5(d)(1)'s "decency and respect" provision is imprecise, but he noted that the criteria for awarding prizes for artistic achievement—such as "artistic excellence and artistic merit"—are inevitably imprecise. *Id.* at 38a-40a. He concluded that, in any event, constitutional vagueness principles, which apply to direct regulation of speech, do not apply to grants awarded on selective criteria. *Id.* at 40a-41a. "An artist applying for an NEA grant has no formula, and is not entitled to one, for the painting or performance which will produce a grant." *Id.* at 41a.

Furthermore, Judge Kleinfeld stated that "the majority has found prohibitions in the statute which are not there." Pet. App. 41a. He noted that Section 5(d)(1), which reflects Congress's desire to exercise greater control over the NEA's expenditures of taxpayer money, does not prohibit the NEA from providing grants to support indecent or offensive art. Instead, Section 5(d)(1) merely requires that

the NEA ensure that "general standards of decency and respect for the diverse beliefs and values of the American public" are "tak[en] into consideration" as relevant factors in the grant selection process. *Id.* at 41a-43a.

5. The government filed a petition for rehearing and a suggestion of rehearing en banc. The court of appeals denied the petition and suggestion. Pet. App. 90a-91a. Judge O'Scannlain dissented in an opinion in which Judges Kozinski and Kleinfeld joined. *Id.* at 92a-95a. The dissenting judges concluded that the panel's decision gives the NEA statute "an implausible construction," *id.* at 92a, applies "the 'void for vagueness' doctrine where it does not belong," *id.* at 93a, and extends "standard First Amendment principles to a situation that the First Amendment doesn't cover," *id.* at 95a.

SUMMARY OF ARGUMENT

Congress has determined that the NEA should provide federal financial support for the arts through a program that provides limited grants, on a highly selective basis, to specific categories of art projects. Congress's decision to fund art proposals selectively has necessarily required the creation of a process for distinguishing among grant proposals based on "artistic excellence and artistic merit" —criteria that necessarily take into account the content of the proposal and require a substantial element of subjective judgment. The congressional directions set out in Section 5(d)(1) of the NFAH Act, which clarify and enlarge the criteria that inform the selection process, do not violate the First or Fifth Amendments. Most significantly, they take into account valid considerations relating to the expenditure of federal funds, and they do not discriminate invidiously in subsidies in such a way as to suppress expression. The court of appeals was accordingly mistaken in declaring that Section 5(d)(1) is invalid on its face.

A. The court of appeals erred at the outset in interpreting Section 5(d)(1) of the NFAH Act to impose a categorical requirement that grant applications must comport with "general standards of decency and respect for the diverse beliefs and values of the American public." The plain text of Section 5(d)(1) merely indicates that the NEA must ensure that those factors are "tak[en] into consideration" in the course of the NEA's application review process. 20 U.S.C. 954(d)(1). The NEA properly concluded that it could implement Section 5(d)(1)'s direction by increasing the diversity of the NEA's advisory review panels. The NEA's proposed method of implementation is not only consistent with the text and legislative history of Section 5(d)(1) and entitled to deference, but it also avoids any substantial First Amendment issue.

B. Even if this Court concludes that the NEA must specifically advert to the factors set out in Section 5(d)(1) when reviewing each grant application, there is no basis for holding that Section 5(d)(1) violates the First Amendment. Artistic expression is entitled to First Amendment protections from censorship or suppression, but that does not mean that the government must indiscriminately fund specific works of art. The government is entitled to consider a wide variety of factors when determining whether tax monies should be spent, and it may properly consider "general standards of decency and respect for the diverse beliefs and values of the American public" when evaluating artistic excellence and artistic merit. For example, the government may, without violating the First Amendment, consider the form, mode, or style of artistic expression and whether an artistic proposal would meet the artistic needs and interests of the communities that would be served. The government can take such factors into consideration in its funding decisions without discriminating invidiously

in such a way as to aim at the suppression of dangerous ideas.

C. The court of appeals also erred in concluding that Section 5(d)(1) is unconstitutionally vague. That court misapplied the controlling constitutional principles, which prohibit the government from imposing vague standards when *regulating* speech. Those principles are inapplicable in the context of a selective government funding program because the government's refusal to subsidize expressive activity does not, in any meaningful sense, penalize that activity. Moreover, even if vagueness principles apply in this context, Section 5(d)(1) is not unconstitutionally vague because the NEA may adopt regulations that would eliminate any imprecision in the statutory standards.

ARGUMENT

SECTION 5(d)(1) OF THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES ACT DOES NOT VIOLATE THE FIRST AMENDMENT OR THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Introduction

Congress enacted the NFAH Act to foster excellence, diversity, and vitality of artistic achievement in the United States and to broaden public access to the arts. In support of that goal, Congress authorized the NEA to provide highly selective financial support for specific categories of arts projects. Congress used the term "art," as it is commonly understood, to embrace a broad and imprecisely defined range of human endeavor involving conscious use of human skill and imagination. In the context of such a program, Congress may legitimately choose to allow the NEA to select artistic projects, including artistic creations, that not only demonstrate technical proficiency, but also that are appropriate to or meet the needs

of targeted populations or have sufficient impact upon or appeal to a national, regional, or local audience.

Congress created the NEA's grant application and review process to provide a mechanism and selection criteria to guide the NEA's determination of which artistic projects, in Congress's view of the public interest, warrant public financial support. The court of appeals ruled that the Constitution bars Congress from directing the NEA to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in the course of evaluating the "artistic excellence and artistic merit" of projects and works of art for which federal funding is sought. That ruling places an extraordinary limitation on government funding that, as a matter of constitutional law, is both unwarranted and unwise.

There is no question that the arts are communicative and are therefore entitled to First Amendment protection. There also is no question that the First Amendment forbids the government from adopting a paternalistic role with respect to private artistic expression by prohibiting controversial art merely because either the government itself or some (or even many) private persons may find it unartistic or offensive. But that does not mean that the government must fund art without any regard to those considerations.

The government has always made funding decisions with respect to art based on traditional conceptions of the public interest, including considerations of artistic excellence and merit, the impact of a particular project on the community it serves, and, in appropriate circumstances, whether a particular work of art has sufficient artistic appeal to warrant public financial support. Indeed, if the government could not employ selection criteria that take account of such considerations, it might have little choice but to fund art based on random selection.

The NEA funding program, like all programs for selective funding of the arts, must by definition take into account the content of artistic proposals. We submit that Congress acted within its powers by directing the NEA to provide funding based on "artistic excellence and artistic merit" and to ensure that "general standards of decency and respect for the diverse beliefs and values of the American public" are taken into consideration in applying those general criteria. As a practical matter, Section 5(d)(1)'s funding restrictions are far more limited than respondents assert. As a constitutional matter, Section 5(d)(1) does not violate the First Amendment or the Due Process Clause of the Fifth Amendment.

A. The Court Of Appeals Misinterpreted Section 5(d)(1) Of The NFAH Act

Respondents base their constitutional challenges to Section 5(d)(1) of the NFAH Act primarily on their view that it imposes, on its face, impermissible content-based and viewpoint-based restrictions on expressive conduct. In assessing respondents' facial constitutional challenge, the courts have an obligation to construe Section 5(d)(1) in a manner that avoids an unnecessary conflict with constitutional principles. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). Moreover, respondents' facial challenge must be rejected unless respondents can "establish that no set of circumstances exists under which the Act would be valid." *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)).[5]

[5] This Court has recognized that parties have greater latitude to bring a facial challenge under the First Amendment if the challenged statute is substantially overbroad in the sense that the law "has the potential to chill the expressive activity of others not before the court." *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 129 (1992). That prospect for "chilling" expressive conduct, however, is not present here. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Rust*, 500 U.S. at 193.

The court of appeals ignored those principles and, as a result, created an unnecessary conundrum. As we explain below, the court of appeals adopted an extreme construction of Section 5(d)(1) that is not required by the statutory language and that increases rather than decreases the basis for the constitutional objections that respondents raise. By contrast, the NEA has interpreted and implemented Section 5(d)(1) in a sound way that avoids any serious constitutional issue. The NEA's approach reflects a reasonable interpretation of its delegated responsibilities and is therefore entitled to deference. See, *e.g.*, *Rust*, 500 U.S. at 184; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

1. *Section 5(d)(1) does not impose a categorical requirement that applications comport with "general standards of decency and respect for the diverse beliefs and values of the American public"*

Section 5(d), as enacted in 1965, provided that the NEA could provide grants only upon an application submitted in accordance with NEA regulations and procedures. The 1990 Amendments modified Section 5(d) to provide additionally as follows:

> *In establishing such regulations and procedures, the Chairperson shall ensure that—*
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration* general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. 954(d) (emphasis added). As the highlighted terms indicate, Congress's amendment of Section 5(d)(1) has a limited scope. It directs the Chairperson, in establishing regulations and procedures for judging NEA grant applications, to ensure that: (a) applications are judged on the criteria of artistic excellence and artistic merit; and (b) "general standards of decency and respect for the diverse beliefs and values of the American public" are "tak[en] into consideration."

Section 5(d)(1) plainly does not say that "the NEA must use 'decency and respect' as the decisive criterion for awarding grants." Pet. App. 92a (O'Scannlain, J., dissenting from the denial of rehearing en banc). Rather, Section 5(d)(1) merely directs the Chairperson to ensure that those factors are taken into account in fashioning the NEA's process for awarding financial aid. The Act, by its terms, gives the Chairperson considerable discretion in determining how to do so.

The court of appeals accordingly erred in holding that the NEA could implement Section 5(d)(1) in only one way —by "examin[ing] each grant application to determine if it comports with 'general standards of decency' and shows 'respect for diverse beliefs and values.'" Pet. App. 17a; see also *id.* at 8a (Section 5(d)(1) requires the Chairperson "to judge applications according to standards of 'decency and respect'"). The NEA is under no obligation to review or reject applications on that basis. The court of appeals' construction of Section 5(d)(1) is not only wrong, but it also distorts the constitutional question before this Court and creates "an imagined conflict with the First Amendment." *Id.* at 92a (O'Scannlain, J., dissenting from the denial of rehearing en banc). See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 160 (1946) (Frankfurter, J., concurring).

2. The NEA has properly construed Section 5(d)(1) as merely requiring that it take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" in the course of its application review process

Section 5(d)(1) does not establish a litmus test for NEA funding, and this Court should not analyze respondents' facial constitutional challenge to Section 5(d)(1) as if it did. The precise constitutional question before the Court is whether Congress may direct the NEA to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public" in establishing regulations and procedures to govern the grant selection process. Section 5(d)(1) "does not speak directly to" how the NEA should take the prescribed factors into account. Compare *Rust*, 500 U.S. at 184. Congress delegated that responsibility to the NEA, which is the federal agency charged with implementing the statute. See, *e.g.*, *Chevron*, 467 U.S. at 842-845. Under established principles of administrative law, the NEA's interpretation and implementation of Section 5(d)(1) "may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress's expressed intent." *Rust*, 500 U.S. at 184. Those standards are satisfied here, and the NEA's approach therefore should have been sustained by the courts below.

The NEA adopted a mechanism for implementing Section 5(d)(1) through the grant application review process. The NEA has recognized that its process for reviewing the "artistic excellence and artistic merit" of an application has always rested on a consensus judgment that contains subjective elements and that implicitly embodies the personal experiences, values, and beliefs of those who participate in the reviewing process. The NEA concluded

that carefully selected advisory panels, coupled with a determined effort to ensure that those panels enjoy a diverse composition of artists and non-artists reflecting a wide range of geographic and cultural perspectives, would adequately ensure "consideration of general standards of decency and respect for the diverse beliefs and values of the American public" in the evaluation of "artistic excellence" and "artistic merit." 20 U.S.C. 954(d)(1). See Declaration of NEA Deputy Chairman Randolph McAusland, J.A. 79-80.[6]

The court of appeals erred in rejecting, without analysis, the NEA's judgment about the most appropriate way in which to implement Section 5(d)(1). That court simply relied on its mistaken understanding that Section 5(d)(1) in effect imposes a rigid litmus test. See Pet. App. 11a.

Significantly, the NEA's approach—unlike the court of appeals' view—is consistent with Section 5(d)(1)'s statutory terms. Furthermore, the NEA's conclusion that Section 5(d)(1) does not impose a rigid prohibition of the sort posited by the court of appeals is supported by the fact that Congress *did* impose such a prohibition in narrowly circumscribed circumstances elsewhere in the 1990 Amendments (in barring the use of funds for works that have been determined by a court to be obscene), and by Congress's rejection in 1990, after extensive debate, of the Rohrabacher proposal, which would have imposed express funding prohibitions going well beyond obscenity. See pp. 7-8, *supra*. The NEA's construction is also consistent with the sparse legislative history specifically addressing the "decency" and "diverse beliefs and values" provisions of Section 5(d)(1), which indicates that they were intended

[6] As the McAusland Declaration indicates, the NEA's efforts to ensure panel diversity go beyond what the NFAH Act otherwise requires and represent a determined effort to effectuate Section 5(d)(1)'s mandate. See J.A. 79-83.

to identify non-dispositive considerations and to be implemented through procedural reforms.[7] Respondents have come forward with no evidence that the NEA's chosen mechanism of increasing advisory panel diversity fails to fulfill the statutory objective of assuring that "general standards of decency and respect for the diverse beliefs and values of the American public" are taken into consideration.[8]

Finally, the NEA's approach does not pose any serious First Amendment issue. Respondents have not contended that the NEA's pre-1990 decisionmaking processes were facially invalid. Respondents cannot seriously contend that the NEA's efforts to increase advisory panel diversity beyond what was required in 1990, and thereby further broaden the perspectives that are brought to bear in the grant review process, amounts to a facial violation of the First Amendment.

[7] See 136 Cong. Rec. 28,621 (1990) (Rep. Pashayan) ("The Williams-Coleman substitute makes it clear that public funds for the arts must be granted in such a way as to take into consideration the general standards of decency and respect that the American people hold for the rights of each other, and the beliefs and values of each other."); *id.* at 28,634 (Rep. Gunderson) ("it will solve the problems procedurally, without getting into censorship"); *id.* at 28,637 (Rep. Coleman) (his proposal "tr[ies] to put the pluralism in the very threshold question of the people who will determine what is artistic excellence and what is artistic merit").

[8] Indeed, there is considerable reason to doubt that respondents—who apparently oppose *any* role for those factors in the NEA's grant-making process—should be heard to argue that the NEA should have gone further and provided for those factors to play a decisive role in individual grant decisions.

B. Section 5(d)(1) Does Not, Under Any Reasonable Interpretation, Violate The First Amendment's Limitations On The Power Of Government To Impose Content-Based And Viewpoint-Based Restrictions On Speech

The NEA's construction of Section 5(d)(1) is sound. Furthermore, it eliminates the constitutional confrontation that the court of appeals created by elevating its own rigid interpretation as the only reasonable construction and then striking Section 5(d)(1) down as unconstitutional on its face. But even if this Court were to find the NEA's approach inadequate and conclude that NEA decisionmakers must specifically advert to "general standards of decency" and "respect for the diverse beliefs and values of the American public" when reviewing each grant application, there would be no basis for holding that Section 5(d)(1) is facially unconstitutional under the First Amendment. Section 5(d)(1) cannot reasonably be construed to go further than requiring the NEA to provide in its regulations or procedures for the inclusion of "general standards of decency" and "respect for * * * diverse beliefs and values" as non-dispositive components of the "artistic excellence and artistic merit" calculus. Such a review process would be fully consistent with the First Amendment. Accordingly, if the Court concludes that the NEA's implementation of Section 5(d)(1) by providing for carefully selected and diverse panels is insufficient to satisfy that Section, the Chairperson should be afforded the opportunity in the first instance to consider what additional measures would be appropriate.

1. *The First Amendment does not categorically prohibit the government from taking content and public appreciation into account in deciding which grant applications are sufficiently meritorious to receive public funding*

The First Amendment generally prohibits the government from regulating protected speech based on its substantive content or the message it conveys. See, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995) (citing *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972)). That prohibition has particular force if the government attempts to regulate "not subject matter, but particular views taken by speakers on a subject." *Id.* at 829 (citing *R. A. V.* v. *St. Paul*, 505 U.S. 377, 391 (1992)). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Ibid.* (citing *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

Those general limitations on the government's power to *regulate* speech do not, however, necessarily constrain *government funding programs* that have the purpose or effect of selectively subsidizing expressive conduct. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Rust*, 500 U.S. at 193 (quoting *Maher* v. *Roe*, 432 U.S. 464, 475 (1977)). Thus, the Court ruled in *Rust* that Congress could create a program for providing grants to family planning projects that was limited to projects that advocated pre-conception family planning methods. The Court stated:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, with-

> out at the same time funding an alternative program which seeks to deal with the problem in another way. In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Ibid. The Court's decision reaffirmed the general principle that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right." *Ibid.* (quoting *Regan* v. *Taxation with Representation*, 461 U.S. 540, 549 (1983)); see also, *e.g.*, *Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980).

As the Court recognized in *Rust*, 500 U.S. at 199-200, and reiterated in *Rosenberger*, however, government funding programs are not immune from First Amendment scrutiny. The government has largely unfettered discretion to impose content-based or viewpoint-based restrictions when it "appropriates public funds to promote a particular policy of its own" or "disburses public funds to private entities to convey a governmental message." *Rosenberger*, 515 U.S. at 833. The government has less latitude to impose such restrictions, however, if it "expends funds to encourage a diversity of views from private speakers." *Id.* at 834. For example, if the government provides funding to create a public forum to facilitate public debate, it "must respect the lawful boundaries it has itself set." *Id.* at 829. Thus, when a public university provides funding for student publications to promote an open and robust dialogue on matters of public concern, the university cannot deny funding to a student religious organization based solely on the ground that the organization's publication presents "an avowed religious perspective." *Id.* at 832.

The Court's decision in *Rosenberger* conceptualized differences in government funding programs in part by reference to whether the government has subsidized a

"governmental message" or whether it has effectively created a "forum" to encourage a dialogue on matters of public concern. See 515 U.S. at 829-830, 833. Those characterizations are helpful analytical constructs for evaluating First Amendment principles in certain important and recurring contexts, but they should not be applied beyond the limits of their logic or usefulness. Although those constructs describe two significant features of the First Amendment's terrain, they have limited descriptive value when a government funding program subsidizes expressive conduct without necessarily conveying a government message or creating a forum for private expression. As we next explain, Congress's current program for funding artistic expression through the NEA cannot be fairly characterized as falling squarely within either description.

2. ***The NEA's funding program neither subsidizes a government message nor creates a forum for private expression***

a. Congress has selectively funded the arts in a broad variety of contexts without constitutional controversy. For example, Congress, as well as government agencies and officers exercising delegated power, have determined what artistic works should decorate government buildings, adorn public places, and occupy public museums. They have routinely made those decisions, taking into account the content or "message" of the artistic works, usually without encountering First Amendment objections.

In some situations, government funding of the arts can be fairly characterized as subsidizing a government message. For example, government funding of memorials and monuments may be viewed as an expression of a governmental message favoring democracy and patriotism over fascism or communism. Thus, the NEA's conduct of the

design competition for the Vietnam Veterans Memorial was in aid of the eventual expression by the government regarding the appropriate way in which to commemorate and honor those who served in the Vietnam War. In other instances, government funding might be fairly characterized as creating a public forum. For example, government funding for town hall meetings to encourage a public dialogue on the state of the arts would, as a conceptual matter, resemble the creation of a public forum. In a similar vein, the NEA's Open Studio Project funds public access Internet sites, primarily at arts institutions, in every State and territory.

A considerable portion of government funding of the arts, including the NEA's selective funding of artistic creations, cannot reasonably be described, however, as either conveying a governmental message or as creating a forum for the exchange of private views. Those characterizations are often inadequate, in part, because of the nature of artistic expression. A work of art, while clearly protected expression in its own right, cf. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995), frequently is not communicative in the same sense as conventional speech on matters of public concern. An artist's work intentionally may project no conventional linguistic or cognitive message; the intended message may be abstract, emotive, or purposefully obscure or ambiguous; that message may be multifaceted, ironic, or internally inconsistent; it may be inaccessible without an independent understanding of the work's context and origins; and, quite aside from any message intended by the artist, the work may be subject to varying interpretations from the perspective of viewers or listeners.[9] Consequently, a work of art may not express a

[9] To be sure, many art forms—most obviously, literature and theatrical arts—may convey more explicit linguistic or symbolic messages.

single, identifiable message that the government or other "speakers" could, in any conventional sense, endorse or oppose.

The nature of the NEA's grants-in-aid programs further explains why selective funding of artistic creations is not susceptible to analysis in terms of either creating a governmental message or creating a forum. In the first place, the basic statutory criteria of "artistic excellence and artistic merit" call for aesthetic judgments that are often subjective and highly contested. They necessarily call for a governmental assessment of the value of the project or work that would raise more substantial First Amendment concerns in other settings where the government has undertaken to facilitate private expression, such as in a truly public forum, see *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), or when providing mailing privileges for periodicals, see *Hannegan* v. *Esquire, Inc.*, *supra*. As the First Circuit explained in a similar case:

> [W]hile it may be feasible to allocate space in an auditorium without consideration of the expressive content of competing applicants' productions, such neutrality in a program for public funding of the arts is inconceivable. The purpose of such a program is to promote "art," the very definition of which requires an exercise of judgment from case to case. Moreover, money is a more flexible instrument than a public building: an applicant may receive varying amounts depending upon his needs and the promise of his work; similarly, the quantity of available funds may vary. Solutions that may work for an auditorium, such as scheduling on a first-come-first-served basis or upon a prescribed

But other artistic works, such as Chopin's piano études, Rembrandt's commissioned portrait works, or Rodin's sculptures of the human hand, contain no such express message.

> showing of likely box-office success (if that is a solution), are simply not available to a program for funding the arts. If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable.

Advocates for the Arts v. *Thomson*, 532 F.2d 792, 796, cert. denied, 429 U.S. 894 (1976).

Moreover, the government may decide to fund a proposed artistic undertaking for a wide variety of reasons—such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form—without adopting or endorsing any intended or perceived message that might be contained in the artist's work. At the same time, government may institute a selection process designed to implement such public policy choices—including reviewing competing proposals under prescribed public interest criteria—without creating a forum.

Nor does a forum result from the fact that government funding supports art that might ultimately be publicly viewed. The term "forum" describes a meeting place or medium for the exchange of multiple (and typically opposing) viewpoints. See *Rosenberger*, 515 U.S. at 830; *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 815-818 (1985); *Perry Educ. Ass'n*, 460 U.S. at 45. Congress itself does not, in any meaningful sense, create a forum if it chooses, on an ad hoc basis, to fund a single artistic creation, or even several discrete and unrelated works of art. Similarly, Congress does not create a forum by authorizing the NEA to select for funding a limited number of discrete and unrelated artistic

projects, including some artistic creations, through a competitive application process that applies prescribed selection criteria to the application pool.

b. The court of appeals accordingly erred in evaluating the NEA's funding program on the basis of the "governmental message" and "public forum" constructs, which are simply not helpful in this context. See Pet. App. 21a-26a. The court of appeals' reliance on *Rosenberger*'s public forum construct is particularly misplaced. In that case, the Court usefully employed that construct to evaluate the University of Virginia's program for funding the publications of student organizations. The Court concluded that the University had created what was, in essence, a forum for private expression by comprehensively funding a medium for those organizations to express views on matters of public interest through conventional protected speech. Having created that medium, the University could not categorically exclude one particular viewpoint from participation. 515 U.S. at 828-837.[10]

The NEA funding program differs in fundamental ways from the program at issue in *Rosenberger*. The NEA funding program is not designed to create a forum for discussion of matters of public interest. Rather, it is designed to provide a highly selective funding mechanism for artistic projects that are, from Congress's public policy perspective, most deserving of the public's financial

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[10] As the Court explained, the University of Virginia program funded the extracurricular activities of virtually all student organizations that were "related to the educational purpose of the University," *Rosenberger*, 515 U.S. at 824, including 118 of the 135 groups that had applied for money during the 1990-1991 academic year, *id.* at 825. The Christian student organization was denied funding solely because its publication adopted the "prohibited perspective" of expressing a belief in a deity. *Id.* at 827, 831.

support. Congress made that point clear in its declaration of findings and purposes:

> It is necessary and appropriate for the Federal Government to complement, assist, and add to programs for the advancement of the humanities and the arts by local, State, regional, and private agencies and their organizations. In doing so, the Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.

NFAH Act § 2(5), 20 U.S.C. 951(5).

Congress fashioned a highly selective grants-in-aid process, which provides funds to specific categories of artistic projects, in order, *inter alia*, to "fulfill [the Federal Government's] educational mission, achieve an orderly continuation of free society," "provide models of excellence to the American people," "transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art." NFAH Act § 2(11), 20 U.S.C. 951(11). Congress gave no indication, explicitly or implicitly, that it intended thereby to create a forum for private expression.

Congress has indicated, of course, that the NEA funding program may support diverse types of artistic projects. See NFAH Act § 5(c), 20 U.S.C. 954(c). But Congress's mere intention to support diverse kinds of artistic projects, or even diverse kinds of art, does not establish that Congress intended to create a public forum. The NEA's funding program, which provides grants for discrete projects based upon rigorous selection criteria rooted in artistic excellence and artistic merit, rather than the

furthering of private discourse, lacks the essential characteristic of a forum: "the free exchange of ideas." *Cornelius*, 473 U.S. at 800. To the contrary, Congress's specification of explicit findings and purposes for public arts funding, its strict limitation of funding to projects meeting specific criteria, and the NEA's resulting ability to provide funding to only a small fraction of the applicants demonstrate that Congress did not intend to create a forum.

Furthermore, the award of each grant by the NEA necessarily rests on an individualized determination by the Chairperson, on the basis of a recommendation by the Council (which in turn is informed by the recommendation of an arts panel), that the project reflects "artistic excellence and artistic merit," and does so to such a degree that it warrants approval for public funding over competing applications. Accordingly, even though the funded private expression does not constitute the government's "own speech," *Rosenberger*, 515 U.S. at 834, and does not convey a "governmental message," *id.* at 833; compare *id.* at 833-834 (distinguishing *Rust*), and even though the government itself might not agree with and does not endorse any message that the private expression conveys, the individualized determination by government decisionmakers that the project or work of art is sufficiently meritorious to warrant public funding does give rise to a distinct "communicative element inherent in the very act of funding itself," *Rosenberger*, 515 U.S. at 892-893 n.11 (Souter, J., dissenting)—namely, that, in the government's judgment, the project or work has artistic excellence and merit. This "communicative element" in government funding was not as pronounced in *Rosenberger* because in that case the University's funding of numerous forms of student expression did not single out any particular example of expression as being, in the

university's view, the most "excellent" and "meritorious." In Section 5(d)(1) of the NFAH Act, Congress has adopted a policy of supporting projects and works that the government itself affirmatively determines have artistic excellence and merit. Congress is entitled to considerable latitude in identifying the criteria that may inform the government's own aesthetic judgments under such a program.

Finally, the NEA funding program, unlike the program in *Rosenberger*, does not categorically prohibit funding of any protected speech—it simply requires, at most, that the NEA consider several non-exclusive and non-conclusive factors in determining whether an artistic proposal warrants public financial support. This case thus does not implicate the central problem that was present in *Rosenberger*, where the University simultaneously created a forum "to encourage a diversity of views from private speakers" and at the same time "silence[d] the expression of selected viewpoints" within that forum. 515 U.S. at 834, 835.[11]

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[11] This case therefore does not present the somewhat different constitutional issues that would be presented by a provision, such as the one in effect for fiscal year 1996 (similar to the proposal rejected in 1990, see pages 7-8, *supra*) that flatly prohibited the funding of any material that "denigrates the religious objects or religious beliefs of the adherents of a particular religion." See Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. II, § 331(c), 110 Stat. 1321-209. The Office of Legal Counsel of the Department of Justice expressed the opinion, which was conveyed to Congress while a similar provision was under consideration in 1995, that such a provision would be infirm under the First Amendment. See Letter of October 5, 1995, from Andrew Fois, Assistant Attorney General for Legislative Affairs, to Representative Sidney Yates. Perhaps because of such concerns, Congress added to the statutory prohibition (which also applied to material that "depicts or describes, in a patently offensive way, sexual or excretory activities or organs") the qualification that it was to "be strictly applied without regard to the content or viewpoint of the material or performance." 110 Stat. 1321-209.

In short, this Court's decision in *Rosenberger* simply does not address the issue presented here. Furthermore, nothing in *Rosenberger* repudiates the general rule, articulated in *Rust* and other cases, that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest." *Rust*, 500 U.S. at 193. The NEA program should accordingly be evaluated on the basis of the general and overarching principle that Congress may selectively fund activities based on criteria that it rationally concludes, within the confines of the First Amendment, take into account the public interest. As we explain below, even if Congress has required the NEA to make its funding decisions through explicit consideration of the "decency" and "diverse beliefs and values" factors, Section 5(d)(1) is consistent with the First Amendment.

3. *Section 5(d)(1) is consistent with the First Amendment's core function of protecting individual freedom of expression*

The First Amendment prohibits government from "abridging the freedom of speech" to preserve individual liberty and encourage freedom of expression. A government program that provides public funds to facilitate expressive activity therefore will, as a general matter, promote rather than retard First Amendment values. The choice of appropriate criteria for selecting which activities to fund rests primarily with Congress. Respondents themselves, who have received public funds for their artistic activities in the past, have no objection to public funding for the arts so long as its disbursement is based on criteria of artistic excellence and merit from which any consideration of decency or respect for diverse American values and beliefs has somehow been excised. The choices

that Congress expressed in Section 5(d)(1), however, do not infringe any First Amendment right.[12]

The Constitution vests Congress with the power to authorize expenditures for "the general Welfare of the United States," U.S. Const. Art. I, § 8, Cl. 1, and Congress has broad discretion to determine what considerations of public interest should govern the expenditure of public funds. See, *e.g.*, *South Dakota* v. *Dole*, 483 U.S. 203 (1987); *Regan*, 461 U.S. at 549-550. Even if Congress had, in fact, required the NEA specifically to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in its selective evaluation of "artistic excellence" and "artistic merit," such an instruction would have been entirely reasonable and within the confines of the First Amendment. Those criteria do not, on their face, "discriminate invidiously * * * in such a way as to 'ai[m] at the suppression of dangerous ideas,'" *Rosenberger*, 515 U.S. at 834, quoting *Regan*, 461 U.S. at 548 (internal citations omitted), or otherwise threaten First Amendment values.

The NEA funding program, like any program for funding of the arts short of random distribution of funds to every self-described artist, must, by definition, take into

[12] We note that different First Amendment concerns could come into play if government funding manipulates or skews the "marketplace of ideas" in a way that monopolizes the opportunity for free expression or effectively suppresses the communication of disfavored viewpoints. See *Regan*, 461 U.S. at 550. The NEA's funding program is unlikely to have such an effect because it provides only a small fraction of the total available funding for the arts. See, *e.g.*, R. Post, *Subsidized Speech*, 106 Yale L.J. 151, 194 n.208 (1996) (estimating that "NEA support for the arts is about 5% of total donations"); see also D. Shapiro, *Free Speech and Art Subsidies*, 14 Law & Phil. 329, 344 (1995) (in light of the independence and adversarial stance of the modern arts community, "it's hard to see the cultural marketplace for arts meekly following the government's view that certain artistic messages or viewpoints are not worthy of support").

account the content of artistic proposals. Section 5(d)(1) identifies factors that are reasonable in light of Congress's legitimate objective to fund art that reflects the "rich cultural heritage" of the United States, NFAH Act § 2(6), 20 U.S.C. 951(6); its concern that "[s]uch funding should contribute to public support and confidence in the use of taxpayer funds," *id.* § 2(5), 20 U.S.C. 951(5); and the commonsense basis for allowing some measure of public appreciation to play a role in a program for public funding of the arts in a democracy. Those criteria do not, in any meaningful sense, result in viewpoint-based suppression of protected speech.

a. As an initial matter, Section 5(d)(1)'s reference to "general standards of decency" may be properly understood as setting out aesthetic concepts or guideposts that refer to the mode or form of the artistic activity, and not to any substantive viewpoint or message it may embody. That distinction is significant, as recognized by this Court in holding that the First Amendment does not prohibit the government even from directly regulating private speech, in appropriate contexts, based on the form, mode, or style of expression. See, *e.g.*, *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681-686 (1986); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 743 n.18 (1978) (opinion of Stevens, J.).

The Court's decisions in *Bethel* and *Pacifica* demonstrate that point in the specific contexts of public schools and broadcasting. The Court ruled in each of those cases that government could regulate modes or forms of expression that are highly offensive to substantial portions of the public—such as the use of epithets, profanity, and sexual or excretory imagery—without regard to the content of communication. As the Court observed in *Bethel*:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offen-

> sive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.

478 U.S. at 683. See *Pacifica*, 438 U.S. at 747 (opinion of Stevens, J.) ("[T]he constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context."); *id.* at 743 n.18.[13]

Justice Stevens has addressed the precise distinction at issue here. He has pointed out that a communication may be offensive "[i]ndependently of the message the speaker intends to convey." *E.g.*, *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 83 (1983) (Stevens, J., concurring in the judgment). For example, "the form of his communication may be offensive—perhaps because it is too loud or too ugly in a particular setting." *Ibid.* Government can, in appropriate circumstances, regulate the form or style of a message, apart from its content, because "regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment." *Id.* at 84.[14]

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[13] The Court articulated a similar point in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), where it explained that "certain well-defined and narrowly limited classes of speech," including "lewd," "obscene," and "profane" utterances, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 571-572. Accord *Bethel*, 478 U.S. at 685; *Pacifica*, 438 U.S. at 746 (opinion of Stevens, J.).

[14] In *Bethel*, the Court expressly distinguished vulgarity and viewpoint restrictions. The Court ruled that a school could punish a student for using "vulgar and offensive terms," "lewd, indecent, or offensive speech," "sexually explicit speech," and "vulgar and offensive language" in a speech to his schoolmates, 478 U.S. at 683-684, so long as its decision was "unrelated to any political viewpoint," *id.* at 685. Justice Brennan concurred on the understanding that the penalties were not triggered by "disagree[ment] with the views [the student] sought to express." *Id.* at 689.

In an analogous setting, the Court in *Board of Education* v. *Pico*, 457 U.S. 853 (1982), recognized the same mode/message distinction. The plurality held that, whereas a school library could not remove books from its shelf if motivated by a desire to "suppress[] ideas," such decisions could be based on a determination that the books were "vulgar" or could be motivated by concerns regarding "educational suitability." *Id.* at 871. Concurring, Justice Blackmun emphasized that such decisions could not be motivated by an attempt to suppress ideas or to restrict access to "political ideas or social perspectives," but could be based on the relevance of the books, the quality of the writing, and offensive language. *Id.* at 877-880.

The Court's rulings in *Bethel* and *Pacifica* and Justice Stevens' observations in *Bolger* all deal with government regulation of speech. But they have relevance here as well. If Congress may, in appropriate contexts, directly *regulate* speech based on the mode, form, or style of communication, it surely may authorize the NEA to take into consideration the mode, form, or style of expression in making the necessarily subjective judgment whether a particular proposal has sufficient artistic merit to warrant federal funding.[15]

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[15] The NFAH Act imposes a flat prohibition on the funding of art that has been judicially determined to be obscene. See p. 8, *supra*. The judicial standard for determining obscenity is set out in *Miller* v. *California*, 413 U.S. 15, 24 (1973), which prescribes a three-part inquiry into whether the artistic work appeals to a prurient interest, is patently offensive, and is without serious artistic value. Just as Section 5(d)(1) does not require rejection of a proposal that may be considered "indecent" by some if other factors demonstrate sufficient artistic excellence or merit, so too the First Amendment should not prevent the NEA from concluding in an appropriate circumstance that an artistic proposal that is patently offensive but has some serious artistic value, and therefore does not appear to be obscene under *Miller*, nevertheless

b. Similarly, the NEA can take into consideration "respect for the diverse beliefs and values of the American public" without infringing First Amendment rights. Section 5(d)(1)'s reference to that consideration embodies a sensible—and constitutional—congressional directive that a public funding program designed to support artistic excellence and merit on a nationwide basis should take into account the specific artistic needs, interests, and aspirations of the communities that will be served. As Congress explained in its declaration of findings and purposes:

> The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.

NFAH Act § 2(6), 20 U.S.C. 951(6). Read in that context, Section 5(d)(1) can be viewed as a mandate to consider individual proposals in light of a national interest in enlarging the range of subjects that NEA-funded artistic endeavors might embrace and the range of audiences those endeavors might reach.[16]

In this respect, Section 5(d)(1)'s direction to consider "diverse beliefs and values" *expands* the NEA's criteria for "artistic excellence and artistic merit" beyond those

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does not have *sufficient* artistic value in light of its patently offensive mode of expression to warrant federal funding.

[16] See also NFAH Act § 2(9), 20 U.S.C. 951(9) ("Americans should receive in school, background and preparation in the arts and humanities to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression."); *id.* § 2(10), 20 U.S.C. 951(10) ("It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.").

that might be utilized if proposals were judged merely in terms of technical proficiency. That direction does not violate the First Amendment. To the contrary, a congressional direction that broadens the basis for funding artistic expression actually facilitates the First Amendment's ultimate goal of encouraging freedom of expression.

So understood, neither Section 5(d)(1)'s "decency" provision nor its "diverse beliefs and values" provision imposes any meaningful viewpoint-based restriction on expressive conduct. For example, the NEA can take into consideration the sexual imagery of visual artwork without regard to whether the artwork has an identifiable message or viewpoint. Similarly, the NEA may consider an artistic proposal in light of a "respect for the diverse beliefs and values of the American public" by evaluating whether the proposal will meet an artistic goal apart from any judgment about any viewpoint the proposal might express. Congress may properly direct that, when the NEA evaluates the "artistic merit" of a proposal to provide arts to the American public, the agency should bear in mind that no art forms have universal appeal, and it should consider whether the proposal for artistic expression will augment and enrich the cultural life of the particular community that will be served.

Moreover, to the extent that Section 5(d)(1)'s reference to "respect" for diverse beliefs and values would, in some circumstances, lead the NEA to take into consideration whether a particular project or work might be regarded as disrespectful of certain beliefs or values held by some members of the public, Congress may properly direct the NEA to take that factor into account as part of the calculus in evaluating whether a proposal would sufficiently satisfy the basic statutory requirements of "artistic excellence and artistic merit." That approach is

consistent with the recommendation of the Independent Commission in 1990, based on the consensus view of six First Amendment scholars,[17] that such "additional criteria for selection, if any, should be incorporated into the selection process (perhaps as part of a definition of 'artistic excellence'), rather than isolated and treated as exogenous considerations." *Report* at 89 (quoting Prof. Michael McConnell).[18] It also is consistent with Congress's judgment that the NEA's selection process should be conducted in a way that is "sensitive to the nature of public sponsorship," contributes "to public support and confidence in the use of taxpayer funds," and fulfills the "public purposes the Congress defines." NFAH Act § 2(5), 20 U.S.C. 951(5). And it is significant that, as pointed out above (see pp. 23-25, 36, *supra*), Congress has not imposed a flat ban on the funding of activities that do not satisfy rigidly prescribed standards of decency or respect for diverse values and beliefs of the American public. It has determined, rather, that such considerations of public impact and appreciation should be

[17] Private practitioners Floyd Abrams and Theodore Olsen; Dean Geoffrey Stone of the University of Chicago Law School; and Professors Michael McConnell, Henry Monaghan, and Kathleen Sullivan. *Report* at 85 n.2.

[18] The *Report* continued (at 89-90), still quoting Prof. McConnell:

> Whenever a process is set up so that controversial judgments are superimposed on a system, those judgments are legally and popularly vulnerable. . . . While a work of meager artistic quality should be disallowed because of inappropriateness for public funding, a work of great importance might warrant funding despite the same qualities of inappropriateness. It is better to treat all these factors as aspects of the ultimate aesthetic judgment [by the NEA] rather than to make the additional factors, whatever they may be, absolute prohibitions.

regarded as relevant to continued support for and success of the NEA's program for the public funding of the arts.[19]

At bottom, Congress has simply recognized that the arts do not exist in a vacuum. A wide variety of subjective factors, including general standards of decency and respect for diverse values and beliefs, necessarily inhere in the evaluation of the "artistic excellence"—and especially the "artistic merit"—of a particular project or work under a program of public funding of the arts. It is neither realistic, nor mandated by the First Amendment, that the NEA ignore such considerations in making artistic judgments. Congress has made a legitimate policy judgment that they warrant at least some (albeit non-dispositive) consideration when allocating public funds. See *Rust*, 500 U.S. at 192-193; *Maher*, 432 U.S. at 474. Such consideration of public impact, appreciation, and diversity is far different from a program that "discriminate[s] invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas,'" *Rosenberger*, 515 U.S. at 834 (quoting *Regan*, 461 U.S. at 548 (internal citations omitted)).

C. Section 5(d)(1) Is Not Unconstitutionally Vague Under The First Amendment Or The Due Process Clause Of The Fifth Amendment

The court of appeals' conclusion that Section 5(d)(1) is unconstitutionally vague is also incorrect. This Court has never held that the "void for vagueness" principles developed in cases involving regulation of speech apply to

[19] See also NEA FY 1999 Application Guidelines, at 20 (discussing consideration of impact of proposals and their appropriateness for targeted audiences); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 346, 111 Stat. 1605 (directing NEA to give priority "to providing services or awarding financial assistance for projects, productions, workshops, or programs that serve underserved populations" and that "will encourage public knowledge, education, understanding, and appreciation of the arts").

cases involving congressional funding limitations, and there is no warrant for doing so. Furthermore, even if those principles applied, Section 5(d)(1) would not be facially unconstitutional, because the NEA may implement the "decency" and "diverse beliefs and values" provisions through regulations and guidance that provide further precision.

1. ***The court of appeals misapplied the controlling constitutional principles, which prohibit vague regulation of expressive conduct***

The court of appeals declared that Section 5(d)(1), on its face, is unconstitutionally vague. The court relied primarily on this Court's decision in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which rejected a civil rights demonstrator's argument that a local noise ordinance was void for vagueness. The Court stated in that case that laws imposing vague proscriptions on expressive conduct may raise constitutional issues because such laws may (1) "trap the innocent by not providing fair warning"; (2) allow "arbitrary and discriminatory enforcement"; and (3) thereby "inhibit the exercise of [First Amendment] freedoms." *Id.* at 108-109. The Court concluded, nevertheless, that the noise ordinance was valid because it gave "fair notice," it contained "no broad invitation to subjective or discriminatory enforcement," and it did not "permit punishment for the expression of an unpopular point of view." *Id.* at 112-113.

The court of appeals erred at the outset in transplanting *Grayned*'s vagueness principles, which govern the regulation of expressive conduct, to the NEA grant context. As the Court explained in *Grayned*, a vague law prohibiting expressive conduct can chill speech by leaving uncertain what is prohibited and by allowing arbitrary and discriminatory enforcement. The concern that a vague law may penalize lawful conduct is not present, however, in the

NEA grant process, because Congress's use of imprecise standards for awarding grants does not penalize speech in any meaningful sense. An imprecise standard under a highly selective funding program presents no significant risk of inhibiting the exercise of First Amendment freedoms. Government funding, unlike government regulation, cannot "trap the innocent" or result in "arbitrary and discriminatory enforcement" (*Grayned*, 408 U.S. at 108). See Pet. App. 92a-93a. (O'Scannlain, J., dissenting from denial of rehearing); *id.* at 36a-40a (Kleinfeld, J. dissenting).[20]

As the Court explained in *Rust*, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." 500 U.S. at 193 (quoting *Regan*, 461 U.S. at 549). Accordingly, "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Ibid.* (quoting *Harris*, 448 U.S. at 317 n.19, and *Maher*, 432 U.S. at 475); see also *id.* at 199 n.5. If the government's decision against funding particular speech does not penalize free expression in violation of the First and Fifth Amendments, then imprecision as to what the government will fund likewise should not infringe First and Fifth Amendment rights.[21]

---

[20] The vagueness of a statute's directive could, of course, ultimately give rise to a question of whether Congress has improperly delegated its lawmaking powers. See generally, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361 (1989). Congress, however, has broad authority to issue "broad general directives," *id.* at 372, even when legislating on issues relating to speech. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (upholding a delegation to the Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require). Respondents have made no such "non-delegation" claim here.

[21] As we have noted in the context of viewpoint-based challenges, different constitutional concerns might come into play if government funding had the effect of manipulating or skewing the "marketplace of

The notion that courts should apply First Amendment vagueness principles to government funding decisions is not only unprecedented, but it would lead to intractable problems and, ultimately, unintelligible distinctions. For example, respondents contend in this case that Section 5(d)(1)'s "artistic excellence" criterion has "objective content," but Section 5(d)(1)'s "decency and respect" criteria are "inescapably subjective." Br. in Opp. 19-20. That asserted distinction itself, however, merely reflects respondents' own subjective opinion about those criteria. An individual's conception of "artistic excellence and artistic merit" is invariably informed, to a considerable degree, by the individual's personal experiences, values, and beliefs. Congress stated the criteria for awarding NEA grants in terms of general standards and provided for advisory panels precisely because there is no objectively verifiable measure of "artistic excellence and artistic merit."

Congress properly recognized that the NEA must have a necessary measure of discretion in applying the "artistic excellence and artistic merit" criteria. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989) (Congress may "delegate power under broad general directives."). Despite the imprecision of the terminology, the court of appeals did not conclude that the "artistic excellence and artistic merit" criteria are unconstitutionally vague. See Pet. App. 18a n.18. There is no constitutional impediment to Congress further *clarifying* the selection criteria by stipulating that "general standards of decency and respect for the diverse beliefs and values of the American public" be "tak[en] into consideration" when applying those criteria in the grant award process. See *Rust*, 500 U.S. at 195

---

ideas" in a way that actually suppressed speech. See note 12, *supra*. But, as we also noted, the NEA's funding program is unlikely to have such an effect, and that question, in any event, is not before the Court in this facial challenge. *Ibid*.

n.4 ("Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.").[22]

2. *Even if First Amendment vagueness principles applied in the NEA grant award context, the court of appeals erred in holding that Section 5(d)(1) is facially unconstitutional*

Contrary to the court of appeals' reasoning, Section 5(d)(1) is capable of reasonable application in the grant award process. Even if First Amendment vagueness principles applied in that context, they would not require that the legislation set out standards with "mathematical" precision. See *Grayned*, 408 U.S. at 110. The question would simply be whether the legislation is unconstitutionally vague in the "particular context" in which it is used.

---

[22] Indeed, it is commonplace for Congress to authorize programs of competitive grants based on imprecise criteria. The application of First Amendment vagueness principles to government funding programs could call into question the constitutionality of an unknowable number of the many federal programs designed to foster research and scholarship in the arts and sciences. See, *e.g.*, 20 U.S.C. 80g(a)(1) (authorizing the Board of Trustees of the Woodrow Wilson International Center for Scholars to "appoint scholars, from the United States and abroad, and, where appropriate, provide stipends, grants, and fellowships to such scholars"); 20 U.S.C. 1134h(a) (authorizing the Secretary of Education to award Jacob K. Javits fellowships "for graduate study in the arts, humanities, and social sciences" to "students of superior ability selected on the basis of demonstrated achievement and exceptional promise"); 22 U.S.C. 2452(a) (authorizing the Director of the U.S. Information Agency to award Fulbright grants "when he considers that it would strengthen international cooperative relations"); 42 U.S.C. 284(b) (authorizing the directors of the national health research institutes to fund biomedical and behavioral research subject to appropriate "technical and scientific peer review"); 42 U.S.C. 7382c (authorizing the Secretary of Energy to establish Albert Einstein Distinguished Educator Fellowships for elementary and secondary school teachers "recognized for excellence in mathematics or science education").

Id. at 112. The NEA's proposed implementation of Section 5(d)(1) presents no vagueness problems beyond those already present by virtue of the need to examine "artistic excellence and artistic merit." The NEA would continue to examine grant applications on a comparative basis through the use of advisory panels, which contain both artists and non-artists. The NEA's reliance on those consensus recommendations substantially eliminates the prospect of arbitrary application.

Moreover, the NFAH Act authorizes the Chairperson "to prescribe such regulations as the Chairperson deems necessary governing the manner in which the Chairperson's functions shall be carried out." NFAH Act § 10(a)(1), 20 U.S.C. 959(a)(1). The Chairperson accordingly has ample authority to adopt regulations to implement the "decency" and "diverse beliefs and values" provisions and thereby eliminate any imprecision that might otherwise be present. Hence, there is no warrant for declaring Section 5(d)(1) facially unconstitutional on vagueness grounds without giving the NEA an opportunity to interpret and apply those terms in a specific factual setting.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law * * * abridging the freedom of speech.

2. The Fifth Amendment to the United States Constitution states in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

3. Section 5(d) of the National Foundation on the Arts and the Humanities Act of 1965 (NFAH Act), 20 U.S.C. 954(d), states in relevant part:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
>
> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. * * *

Other relevant provisions of the NFAH Act are reproduced at Pet. App. 96a-105a.

No. 97-371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Supreme Court, U.S.
FILED
1998
CLERK

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,

Petitioners,

—v.—

KAREN FINLEY, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether 20 U.S.C. §954(d)(1), which requires the National Endowment for the Arts to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in judging applications for arts grants in a program designed to support a diverse range of private expression, violates the First and Fifth Amendments because it is viewpoint-based, vague, and restricts what artists create with nonfederal funds.

RULE 29.6 STATEMENT

This brief is filed on behalf of four individuals and one nonprofit corporation, the National Association of Artists' Organizations (NAAO). NAAO does not have any parent or subsidiary companies.

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STATEMENT OF THE CASE

1. Establishment Of The National Endowment For The Arts

Congress created the National Endowment for the Arts (NEA) in 1965 "to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent." 20 U.S.C. §951(5) (1965). In response to concerns that government support for the arts might lead to "attempts at political control of culture," H.R. Rep. No. 618, 84th Cong. 1st Sess. 21, *reprinted in* 1965 U.S.C.C.A.N. 3186, 3205, Congress took several steps to insulate the agency from political pressures, and to insulate private grantees' speech from government control.

First, it enacted a provision, immediately following the statute's statement of purpose, that forbade the Endowment from "exercis[ing] any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any school or other non-Federal agency, institution, organization, or association." 20 U.S.C. §953(c). The House Report described this provision as an "assurance against federal interference in the arts." H.R. Rep. No. 618, *supra* at 15, 1965 U.S.C.C.A.N. at 3200.

Second, Congress made the Endowment an agency of arts professionals guided by artistic merit rather than of politicians who might be driven by political concerns. It required that the NEA's decisionmakers -- the Chair and the National Council -- be experts in the arts. 20 U.S.C. §955(b).[1] And it articulated criteria for funding based on

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[1] As one of the NEA's original sponsors later explained, "[w]hen we structured the Endowment, we were careful to put the artistic decisionmaking in the hands of outside experts and away from the (continued...)

artistic merit. *See* 20 U.S.C. §954 (1965). As the Senate Report explained, the overriding standard for grants would be "artistic and humanistic excellence." S. Rep. No. 300, 89th Cong., 1st Sess. at 4 (1965).[2]

Third, the Senate Report devoted an entire section to "Freedom of Expression," mandating that the agency give "the fullest attention" to artistic freedom of expression:

> It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression. One of the artist's and humanist's great values to society is the mirror of self-examination which they raise so that society can become aware of its shortcomings as well as its strengths. . . .
>
> Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age.
>
> Therefore, the committee affirms that the intent of this act should be the encouragement of free inquiry and expression . . . . [C]onformity for its own sake is not to be encouraged, and . . . no undue preference should be given to any particular style or school of thought or expression.

Id. at 3-4. As one member perhaps best summed it up, Congress's intent was to have "Government assistance, but not intervention . . . support but not control . . . stimulation but not participation."[3]

Over the course of its history, the NEA has made thousands of grants. While it is selective, its benefits are in fact quite widely distributed. Until last year, the NEA historically awarded grants to 60% of the arts organizations who applied; under its reduced funding last year the grant-to-application ratio was about 35%.[4] When individual and

---

[1] (...continued)
influence of government . . . ." 135 Cong. Rec. 16284 (1989)(remarks of Senator Pell). Similarly, NEA Chairperson Frank Hodsoll testified in 1984: "[T]here would be no federal agencies to fund the arts and the humanities without statutory guarantees that Washington bureaucrats would not make the artistic content decisions involved in federally funded projects. Rather, these decisions were to be left to the individual artists and their organizations. The only criterion was to be artistic excellence, and that is the criterion used today." *Hearing on the Grant Making Process of the National Endowment for the Arts*, Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor, 98th Cong., 2d Sess. 4-5 (June 28, 1984)(hereinafter "*1984 Grant Making Hearing*")(statement of Hodsoll).

[2] The reference to "humanistic" reflects the fact that Congress simultaneously created the National Endowment for the Humanities, which was and is organized on similar principles of funding private expression based on professional judgments of merit.

[3] 111 Cong. Rec. 23963 (1965)(remarks of Cong. Monagan). Along similar lines, Congressman Helstoski expressly addressed the fear that "there will be Federal interference in the work of the performing arts." 111 Cong. Rec. 23969 (1965). He responded:

> That is not so . . . . We have shown [in other settings] that there can be federal aid without federal control. In this legislation we propose to do the same thing. The Federal Government will supply the money, but the artists and their organizations will suggest the proposals, select the performances which are to be produced and do all the planning. The Federal Government will be the means, but the end product will be the sole responsibility of the performing artists.

Id.

[4] *Testimony of Jane Alexander, NEA Chairperson*, Before the (continued...)

organizational applicants are considered together, the agency has historically granted about two in seven applications.[5]

2. The Battle Over Controversial Art And Enactment Of The "Decency And Respect" Clause

It is hardly surprising that an agency committed both to artistic excellence and the free expression of its grantees has sometimes supported controversial art. In 1984, for example, Congressman Mario Biaggi criticized the Endowment for supporting a production of Verdi's *Rigoletto* by the Metropolitan Opera and the Virginia Opera Company that depicted several characters as members of the Mafia. Biaggi deemed the production disparaging of Italian-Americans, and proposed amending the NEA's statute to prohibit the use of funds in "any manner to denigrate any ethnic, racial, religious, or minority group." *See 1984 Grant Making Hearing, supra* note 1, at 2, 6. The amendment failed, and this and other controversies passed without making inroads on the core principle of artistic freedom that guided the NEA's creation. *See generally* Livingston Biddle, OUR GOVERNMENT AND THE ARTS: A PERSPECTIVE FROM THE INSIDE (1988).

In 1989, controversy erupted again, this time over the NEA's support of institutions that had displayed the photographs of Robert Mapplethorpe and Andres Serrano. Members of Congress objected vociferously to what they

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[4] (...continued)
Subcommittee on Early Childhood, Youth and Families of the House Comm. on Oversight and Investigations, May 13, 1997, 1997 WL 10571677 at *13.

[5] Between 1965 and 1988, the NEA received about 302,000 grant applications, and awarded approximately 85,000 grants. 136 Cong. Rec. S17979 (Oct. 24, 1990)(statement of Sen. Jeffords).

saw as Mapplethorpe's promotion of homosexuality and Serrano's "blasphemous" work, *Piss Christ*.[6] In response, Congress for the first time imposed on the Endowment ideological restrictions unrelated to artistic merit. Section 304(a) of Pub. L. No. 101-121, 103 Stat. 701, 741 (1989), provided that no funds appropriated for the NEA (or the NEH)

> may be used to promote, disseminate, or produce materials which in the judgment of the [NEA or NEH] may be considered obscene, including but not limited to, depictions of sado-masochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.

A district court declared this restriction unconstitutional in *Bella Lewitzsky Dance Foundation v. Frohnmayer*, 754 F.Supp. 774 (C.D.Cal. 1991), and the United States chose not to appeal.

The controversy continued and, in 1990, Congress amended the NEA statute again, adding the provision at issue in this case. It requires the NEA in judging arts applications to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. §954(d)(1). As Representative Paul Henry, the provison's author, described it, "[t]his substitute includes language in the heart of the

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[6] Senator Jesse Helms, perhaps the leading critic, stated that "[i]t is an issue of soaking the taxpayer to fund the homosexual pornography of Robert Mapplethorpe, who died of AIDS while spending the last years of his life promoting homosexuality." 135 Cong. Rec. 22372 (1989)(remarks of Sen. Helms). And he attacked Serrano's *Piss Christ* as "blasphemy" that "taunted the American people . . . in terms of Christianity." 135 Cong. Rec. 9789 (1989).

grantmaking process. We add to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must constantly be taken into account." 136 Cong.Rec. 28631 (1990). The amendment does not define "decency"or "respect"; nor does it explain how the "beliefs and values of the American public" are to be identified and considered.[7]

Debate on the "decency and respect" clause underscored Congress's purpose: to stop funding art that might offend the "American public's" beliefs and values. Representative Coleman explained that he sponsored the bill because "[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." *Id.* at 28624. And Representative Alexander supported the bill because it addressed his concern that "the Endowment's support for artists like Robert Mapplethorpe and Andres Serrano has offended and angered many citizens in my district." 136 Cong.Rec. 28642 (1990).

3. The Endowment's Implementation Of The "Decency And Respect" Clause

In December 1990, a month after passage of §954(d)(1), the National Council on the Arts, a 26-member body which advises the Chair on policy and grant recommendations, addressed how to enforce the "decency and respect" language. The Council resolved that peer review panels would apply the new standards "as a matter of course because each panelist brought to the table their community's standards of decency and this would become part of the deliberative process." J.A. 12. In keeping with this resolution, NEA officials instructed peer review panel

[7] At the same time, Congress also made several other changes, including a requirement that the Chair select diverse peer review panels. 20 U.S.C. §959(c).

members to "bring to the table those values that the statute states." J.A. 85; *see also id.* at 33 ("the basic instruction that the panels receive [is] that . . . you bring with you your general standards of decency from your communities, from you[r] backgrounds, from your ethnic backgrounds, and that is how we deal with it"). NEA Chairperson Frohnmayer explained to Congress that:

> no one individual is wise enough to be able to consider general standards of decency and the diverse values and beliefs of the American people all by him or herself. These are group decisions. They are made by the National Council on the Arts as well as by the panelists.[8]

In implementing §954(d)(1), therefore, the NEA declined to clarify the statutory terms, and instead delegated interpretation and enforcement of the "decency and respect" requirement to the judgments of hundreds of peer review panel members, 26 National Council members, and the Chairperson.

[8] *Department of the Interior and Related Agencies Appropriations for 1992*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 234 (1991)(testimony of Frohnmayer). When pressed as to whether he himself would apply the "decency" standard in his review of grant recommendations, Frohnmayer stated that if he thought the panel or Council had made a mistake with respect to the decency determination, he would "send it back to them." *Id.* Frohnmayer's successor, Anne-Imelda Radice, testified that she would apply the "decency" criteria in reviewing applications. *Department of the Interior and Related Agencies Appropriations for 1993*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 2d Sess. 613-14 (1992)(testimony of Radice).

4. Effects Of The "Decency And Respect" Clause On Private Speech

The "decency and respect" clause had immediate and widespread chilling effects on the arts community, as illustrated by uncontroverted testimony from Charlotte Murphy, Executive Director of respondent National Association of Artists' Organizations (NAAO), whose hundreds of member institutions and artists regularly apply for and receive NEA funding.

Ms. Murphy explained that because "new and contemporary art of the type presented or created by many NAAO members is by definition often provocative and threatening to traditional or conservative values or notions of morality," NAAO members are "afraid that the 'general standards of decency' requirement will bar them from receiving NEA funding." J.A. 21-22. Some members did not apply for grants for fear that their work would contravene the "decency and respect" clause; others applied but were "chilled in their applications and in the scope of their projects by uncertainty about what the standard means or how to comply with it." J.A. 22-24.

Moreover, because the "decency and respect" clause dictates criteria the NEA must apply in judging grant applications, it affects what artists and institutions produce with nonfederal funds before applying for an NEA grant. As part of the grantmaking process, the NEA inevitably looks at "past performance evaluation and other pertinent information,"[9] including an applicant's prior "body of

[9] *Department of the Interior and Related Agencies Appropriations for 1992*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 232 (1991)(testimony of John Frohnmayer).

work."[10] Thus, "an artist whose work in the past might be considered 'indecent' is ... less likely to receive a grant today because of the decency requirement." J.A. 26.

In addition, NEA grants have a multiplier effect "because frequently private grantsmakers rely on the NEA's judgments in deciding whether to supply additional funds." J.A. 24. "Endowment grants serve as a major catalyst for leveraging nonfederal support. In FY 93, for example, Endowment grants of about $120 million generated matching funds estimated at $1.1 billion, a ten-fold match."[11] The reverse is also true: the NEA's rejection of an applicant affects the applicant's ability to obtain nonfederal funding.

5. The Current Litigation

This lawsuit was originally filed before the "decency and respect" clause was enacted, as a challenge to the NEA's politically motivated vetoes of unanimous peer review panel recommendations for grants to four performance artists, Karen Finley, John Fleck, Holly Hughes, and Tim Miller.[12] After Congress enacted the

[10] Exh. B. to Cole Declaration, *Fiscal Year 1992 Application Guidelines for NEA Theater Grants*, at 65 (separately lodged with the Court)(hereinafter "1992 Guidelines"). The current guidelines, also lodged with the Court, refer to the merits of the applicant, which can only be assessed by judging past work. NEA, *Grants to Organizations – 1999*, at 10, 13, 16, 20 (hereinafter "1999 Guidelines").

[11] *Department of the Interior and Related Agencies Appropriations Act, 1995*, Hearings on H.R. 4602, Pub. L. No. 103-332, 108 Stat. 2499, Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 103d Cong, 2d Sess. 297 (Apr. 20, 1994)(testimony of NEA Chairperson Jane Alexander).

[12] Respondents alleged that the Chairperson vetoed the recommended grants not on artistic merit grounds, but because of the controversial

(continued...)

"decency and respect" clause, plaintiffs amended their lawsuit to challenge the clause because of its chilling effect on their work. They were joined by NAAO, which sued on its own behalf and as representative of its member artists and arts institutions.

On June 9, 1992, the district court declared 20 U.S.C. §954(d)(1) facially unconstitutional in two respects.[13] First, it found the statute to be impermissibly vague, noting that "the very nature of our pluralistic society is that there are an infinite number of values and beliefs, and correlatively, there may be no national 'general standards of decency.'" Pet.App. 77a.

Second, the court held that the statute violated the First Amendment by "seek[ing] to suppress speech that is offensive to some in society." Pet.App. 87a. It analogized public funding of the arts to public funding of universities, following this Court's admonition in *Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991), that the government must respect First Amendment constraints in such "traditional spheres of free expression." Pet.App. 82a. Relying on Congress's own findings in establishing the NEA, the court found that the arts play a central role in democratic discourse similar to the academy, and that a public arts funding program should be governed by principles similar to those governing public

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[12] (...continued)
political ideas contained in the artists' work, which addressed such issues as homosexuality, AIDS, and violence against women. After the district court rejected the government's motion to dismiss and discovery was completed, the NEA agreed to settle the claims, paying plaintiffs the amounts of the vetoed grants, damages, and attorneys' fees. Stipulation and Settlement Agreement, filed June 9, 1993.

[13] As an initial matter, the court rejected defendants' arguments that the constitutional issue could be avoided by construing the statute to require only the appointment of diverse panels, finding it contrary to the statute's plain language. Pet.App. 74a-76a.

universities: funding may be allocated based on judgments of artistic or academic merit but not on extraneous, ideological criteria such as "decency and respect." Pet.App. 85a-87a.

A panel of the Court of Appeals for the Ninth Circuit affirmed the district court's ruling on November 5, 1996.[14] The court held that "decency and respect" provides "no 'ascertainable standard for inclusion and exclusion,'" and "gives rise to the danger of arbitrary and discriminatory application." Pet.App. 17a-18a (quoting *Smith v. Goguen*, 415 U.S. 566, 578 (1974)). The court rejected Judge Kleinfeld's position in dissent that selective government benefit programs are exempt from constitutional scrutiny, reasoning that "'the scarcity of a government benefit does not render it immune from constitutional limitations.'" Pet.App. 5a n.4 (quoting *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 835 (1995)).

The court of appeals also held that the "decency and respect" requirement was unconstitutionally viewpoint-based. Guided by *Rust* and *Rosenberger*, the court identified "two related contexts in which the government may subsidize speech only if it does so in a way that is viewpoint-neutral": the first is what *Rust* characterized as "traditional sphere[s] of free expression"; the second is what *Rosenberger* described as programs designed to "encourage a diversity of views from private speakers." Pet.App. 22a. Both rationales, the court of appeals held, require that NEA funding be viewpoint-neutral. The arts, "no less than the university, are 'at the core of a democratic society's cultural and political vitality.'" Pet.App. 22a. And the NEA is

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[14] Like the district court, the court of appeals first found that the "NEA has failed to present a narrowing construction that is consistent with the language and purpose of the statute, and 'we will not rewrite a . . . law to conform it to constitutional requirements.'" Pet.App. 12a.

designed to support private speech, not to transmit government messages. Pet.App. 22a-24a.

Judge Kleinfeld dissented. Proposing a "prize" exception to this Court's First Amendment doctrine governing support of private speech, he reasoned that because NEA grants are selectively awarded "prizes" rather than generally available "entitlements," Congress may constitutionally impose both content- and viewpoint-based criteria and need not satisfy any vagueness scrutiny. Pet.App. 29a, 38a.

The court of appeals denied the government's petition for rehearing on May 1, 1997. Pet.App. 91a. Judges O'Scannlain, Kozinski, and Kleinfeld dissented, essentially for the reasons that Judge Kleinfeld had initially articulated. *Id.* at 92a-95a.

SUMMARY OF ARGUMENT

For its first 25 years of existence, the National Endowment for the Arts (NEA) judged arts funding applications on the basis of artistic merit, just as public universities make hiring, tenure, and admissions decisions based on academic merit. In 1990, Congress required the NEA for the first time to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" in judging grant applications. 20 U.S.C. §954(d)(1). This legislative change was enacted in direct response to the NEA's support of artworks whose religious or homosexual views Congress deemed offensive to American "beliefs and values." In order to discourage funding of such art, the statute directs a federal agency whose founding purposes are to further artistic excellence and freedom of expression to interpose what the Act's author described as "a shell, a screen, a viewpoint" on judgments of artistic merit.

As both lower courts correctly concluded, §954(d)(1) violates two of the most basic tenets of the First Amendment: (1) that government may not discriminate against private speech simply because some members of the public are offended by its message; and (2) that government regulations affecting speech must be drawn with clarity to avoid creating a license to censor and a chilling effect on freedom of expression.

I. The government's strained attempt to avoid the constitutional issue through statutory construction fails on its own terms. The government has acknowledged that the statute is "indeterminate" and affords the Chairperson unfettered discretion. It also concedes that "decency and respect" must be considered in the application review process. Thus, even accepting the government's construction, the statute requires consideration of "decency and respect," and gives a government official unfettered discretion in doing so. Far from solving the constitutional problems, the government's reading only highlights them. Moreover, the government's proposal that it might implement §954(d)(1) merely by appointing diverse panels is contrary to the statute's plain language, its legislative history, and the NEA's own implementation.

II. The "decency and respect" clause directs the agency to favor applicants whose perspectives are "respectful" of American values and "decent," and to disfavor those whose views are deemed "disrespectful" or "indecent." That is the essence of viewpoint discrimination. Characterizing it as an effort to boost "public confidence" in the NEA is simply an effort to put a positive spin on the illegitimate aim of disfavoring and suppressing dangerous ideas. It echoes the effort in the 1950's to boost "public confidence" in state universities by dismissing scholars whose views were considered "un-American."

The fact that this discrimination occurs in a funding program does not alter the result. As this Court recently

reaffirmed, "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Rosenberger*, 515 U.S. at 830. Viewpoint neutrality is especially critical where (1) the government does not seek to transmit a governmental message, but to support private speech; and (2) the government funds speech in a "traditional sphere of free expression" central to a robust public debate. *Rosenberger*, 515 U.S. at 834; *Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991). The government conceded below that the NEA is not a "government speech" program, but a mechanism for supporting private expression. And it does not dispute the lower courts' conclusion that the arts are a "traditional sphere of free expression."

Of course, the NEA may make certain content-based decisions. Arts funding may be allocated based on artistic merit, just as public university resources may be allocated according to academic merit. But when government seeks to legislate politically correct or "respectful" art, it has violated the First Amendment, just as it would if it sought to legislate political correctness in a public university.

The government argues that public funding of the arts falls somewhere between "government speech" and a program designed to support private expression, and purports to propose an intermediate standard. But the standard it advocates -- mere rationality -- is indistinguishable from that applied to "government speech" in *Rust*. Moreover, none of the government's arguments for distinguishing *Rosenberger* is persuasive. Like the NEA, the University of Virginia's student funding program was a selective one; in any event, selectivity does not justify viewpoint discrimination in supporting private speech. The fact that art is sometimes ambiguous only *increases* constitutional concerns, for artists will be compelled to leave an even wider berth around the statute's proscribed viewpoints, lest their open-ended messages be misconstrued.

The government claims that the NEA's influence on the art world is *de minimis* (contradicting the NEA's own claims in other fora), but never explains why the Court should ignore its many precedents that presume chilling effect where laws discriminate against disfavored ideas. And while it is correct that the statute does not explicitly prohibit funding of "indecent" or "disrespectful" art, and "only" mandates that those factors be adversely considered, that distinction is of no constitutional significance. Surely the University of Virginia could not resurrect its "religious activities" criterion by making it a negative factor in deciding who should receive student activity funds.

III. The "decency and respect" clause is also hopelessly vague. It assigns NEA officials the impossible task of identifying the "beliefs and values of the American public" and "general standards of decency," and then applying them to arts proposals. The government does not even try to explain what "decency and respect" mean. Instead, it asserts that public programs funding private speech should be immune from vagueness scrutiny, and that "decency and respect" are no more vague than artistic merit itself. This Court, however, has repeatedly applied vagueness scrutiny to regulations governing the allocation of benefits to speech, and for good reason: unbridled discretion to favor some private speech over others raises the same specter of discrimination and chilling effect as does discretion to punish. And unlike "decency and respect," artistic merit, like academic merit, has gained a common core of meaning through long application by professionals in the field.

IV. Finally, the "decency and respect" provision is an unconstitutional condition because it penalizes artists' speech beyond the federal program. The NEA bases its judgments in part on an applicant's prior body of work, so "decency and respect" apply not only to NEA-funded work, but to the applicant's entire portfolio. Applicants must accordingly

restrict the content of art they create or produce with their own funds and on their own time.

ARGUMENT

I. THE CONSTITUTIONAL ISSUES CANNOT BE AVOIDED BY STATUTORY CONSTRUCTION

The government's strained effort to avoid a constitutional issue by statutory construction fails for two reasons. First, the government's interpretation, even if accepted at face value, actually exacerbates the constitutional problems presented. And second, the government's suggestion for how the statute might be constitutionally implemented runs directly counter to the statute's plain language, its legislative history, and the NEA's own implementation of the statute.

A. The Government's Interpretation, Even If Accepted, Would Not Avoid The Constitutional Issue

The government argues that the Chairperson could implement the "decency and respect" clause by appointing diverse peer review panels to judge grant applications, and implies that the panels themselves need not consider "decency and respect." Pet.Br. 21-25.[15] But this is not in fact a narrowing construction, and does not obviate the need to address the constitutional issues. The government reads the statute to afford the Chairperson wide discretion in

[15] Significantly, the government nevers states that the Chairperson could *prohibit* peer review panels from considering "decency and respect." Thus, its proposal would not take "decency and respect" criteria out of the application review process.

deciding how to ensure that "decency and respect" are considered. Pet.Br. 22. In the court of appeals, the government was even more candid: it described the statute as "indeterminate," and conceded that "there is no way to predict what the Chairperson's new manner of implementing the statute would be." NEA C.A. Br. 31, 39. It said the Chairperson could do everything from "tak[ing] no action whatsoever," *id.* at 18, to applying "decency" criteria only to applications "for projects whose intended audience is children under twelve years of age," *id.* at 32, to "leav[ing] the decision about what standards of decency to apply to the 'individual [peer review panel members'] personal views of decency or some ephemeral 'general American standards of decency.'" *Id.* at 32.

In light of its view of the statute, the government does not suggest that the "construction" it now offers is *required* by any reasonable statutory interpretation. It simply maintains that the statute *permits* the Chairperson to implement it through the selection of diverse panels. But under the government's construction, the Chairperson could also adopt virtually any other method of "taking into consideration general standards of decency and respect" that he or she chooses. As both lower courts held, a statute that allows the Chairperson unfettered discretion in regulating speech is inherently vague, and cannot be saved by a narrowing construction. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988)(statutes affording government officials unfettered discretion over speech "engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge").

In addition, the government concedes that one thing about the statute is clear: the NEA "must ensure that ['decency and respect'] are 'tak[en] into consideration' in . . . the application review process." Pet.Br. 17. That well-warranted concession is also fatal to the government's contention that the constitutional issues can be avoided. As

long as "decency and respect" must be considered in the process by someone, applicants will be compelled to tailor their work to avoid contravening the criteria. Thus, even accepting the government's reading of the statute, the statute's chilling effect remains, and its constitutionality must be decided.[16]

B. The Government's Interpretation Of The "Decency And Respect" Clause Is Contrary To The Statute's Plain Language, The Intent of Congress, And The NEA's Own Implementation

The government's claim that the NEA can implement the "decency and respect" clause simply by appointing diverse review panels also defies basic principles of statutory construction. First, it ignores the law's plain language, which directs the Chair to establish regulations and procedures that "ensure that: (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." As the court of appeals noted, this language explicitly requires that "standards of decency and

[16] The government raises a straw man in repeatedly objecting that the statute should not be read to make "decency and respect" a "categorical requirement" for funding. Pet.Br. 17, 21. As demonstrated below, whether the criteria are absolute bars or merely negative factors does not affect their constitutionality. *See* Section II.D.4, *infra*. In any event, there is clear language in both lower court opinions that is simply irreconcilable with the government's view. Pet.App. 8a ("these clauses instruct the Chairperson to ensure that standards of decency and respct for diverse values are considered when judging the artistic merit and excellence of an application."); *id.* at 75a ("it is clear from the language of the statute that 'decency' and 'respect' for diverse beliefs *are* factors to be considered").

respect for diverse values are considered when judging the artistic merit and excellence of an application." Pet.App. 8a. When a statute's terms are unambiguous, "judicial inquiry should be complete except in rare and exceptional circumstances." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 873 (1991). The Court "'cannot press statutory construction "to the point of disingenuous evasion" even to avoid a constitutional question.'" *Seminole Tribe of Florida v. Florida*, __ U.S. __, 116 S.Ct. 1114, 1124 n.9 (1996)(quoting *United States v. Locke*, 471 U.S. 84, 96 (1985), and *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)(Cardozo, J.)).[17]

Second, the government's proposed reading renders the "decency and respect" clause redundant of 20 U.S.C. §959(c), passed at the same time, which independently requires the appointment to peer review panels of "individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view." Statutory interpretations that "'render superfluous other provisions in the same enactment'" are not generally countenanced. *Freytag*, 501 U.S. at 877 (quoting *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990)).[18]

[17] As its own selective emphases illustrate in its quotation of the statute, Pet.Br. 21-22, the government asks the Court to read the statute as if "taking into consideration general standards of decency" modified not "the criteria by which applications are to be judged," the clause it immediately follows in §954(d)(1), but the Chairperson's general obligation to develop regulations and procedures. Had Congress intended such a strange result, the "decency and respect" clause would not be in subsection (1), which sets forth the criteria for judging arts applications, but in the overarching language of §954(d), which directs the Chairperson to establish regulations and procedures. In short, the government asks the Court to rewrite the statute, not interpret it.

[18] The government asserts that the agency went beyond what §959(c)

(continued...)

Third, the government's interpretation flies in the face of the clause's legislative history, which makes crystal clear that "decency and respect" were to be "tak[en] into consideration" *in judging applications*. Representative Henry, author of the clause, described it as placing "new language now in the grant procedure itself . . . [which] mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded." 136 Cong.Rec. 28672 (1990). And he reiterated that it identified "a viewpoint that must constantly be taken into account." *Id.* at 28631.

Finally, the government's proffered interpretation is contradicted by its own implementation. As the court of appeals observed, in the period before the law was enjoined, the agency and the National Council:

> did not question their obligation under §954(d)(1) to judge grant applications according to "general standards of decency and respect for the diverse beliefs and values of the American public." Instead, to satisfy this new obligation, NEA officials adopted the approach of having the Chairperson instruct advisory panel members to bring their own definitions of these terms "to the table" and make them "part of the deliberative process."

Pet.App. 11a-12a (quoting Minutes of the December 1990 Retreat of the National Council on the Arts at 21)(now at J.A. 12-13). *See* pp.6-7, *supra*.[19]

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[18] (...continued)
"otherwise requires," Pet.Br. 24 n.6, relying on the Declaration of Randolph McAusland (J.A. 79-83). But McAusland merely states that the appointment of diverse panels was "[c]onsistent with" §959(c). J.A. 79, ¶3.

[19] The government's reliance on *Chevron U.S.A. v. Natural Resources* (continued...)

II. THE "DECENCY AND RESPECT" CLAUSE VIOLATES THE FIRST AMENDMENT BY IMPOSING VIEWPOINT-BASED CRITERIA ON A GOVERNMENT PROGRAM DESIGNED TO SUPPORT PRIVATE ARTISTIC EXPRESSION

The "decency and respect" clause expressly disfavors private speech that fails to "respect" the American public's "beliefs and values" or offends its "standards of decency." Under this staute, the depiction of a nude will be disadvantaged if its perspective is deemed "indecent" or "disrespectful," and advantaged if its perspective is "decent" and "respectful." The law discriminates among speakers based not on their subject matter, but their viewpoint. And it discriminates against the very speech the First Amendment protects most -- the controversial and the unpopular.

Such viewpoint discrimination is presumptively unconstitutional. Even where the government is subsidizing rather than penalizing speech, it may not "favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508

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[19] (...continued)
Defense Council, 467 U.S. 837 (1984), is misplaced. *Chevron* held that if a statute is "silent or ambiguous" with respect to a particular question of interpretation, the relevant agency's construction, if reasonable, should govern. *Id.* at 843-44. Here, the "decency and respect" clause is neither silent nor ambiguous as to whether "decency and respect" should be considered. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)("administrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference"). In addition, "deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988); *see also Smiley v. Citibank (South Dakota) N.A.*, __ U.S. __, 116 S.Ct. 1730, 1733 (1996).

U.S. 384, 394 (1993)(quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).[20] As the court of appeals correctly held, this mandate applies with particular force in two settings: (1) where the government program is designed to "encourage a diversity of views from private speakers," *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. at 833; and (2) where the government funds speech in "traditional sphere[s] of free expression so fundamental to the functioning of our society," such as public universities. *Rust v. Sullivan*, 500 U.S. at 199-200. The NEA falls squarely within both categories.

The *only* setting in which this Court has permitted the government to dictate viewpoint in funding speech is where the government itself "is the speaker or . . . enlists private entities to convey its own message." *Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 199). The government conceded below that NEA funding is not designed to transmit a government message, but to support diverse private expression. Yet the standard the government proposes to apply here -- mere rationality -- is indistinguishable from that applied to government speech in *Rust*. As we will show, none of the government's reasons for distinguishing the NEA from settings where viewpoint neutrality is required is persuasive.

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[20] *See also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)("the goverment violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983)(selective allocation of subsidies may not "'ai[m] at the suppression of dangerous ideas'")(quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

A. The "Decency And Respect" Clause Discriminates On The Basis Of Viewpoint

The "decency and respect" clause, which turns on whether one shows *respect* or *disrespect* toward the American public's "beliefs and values," is a paradigmatic example of viewpoint discrimination. The statute does not proscribe a particular subject, but particular points of view. As the government concedes, a statute that prohibited funding of art that "denigrates religious beliefs" would be unconstitutionally viewpoint-based. Pet.Br. 36 n.11.[21] Because the "decency and respect" clause is equally aimed at "suppressing dangerous ideas," it too is viewpoint-based and invalid.

This Court has carefully distinguished viewpoint discrimination from subject matter prohibitions in government funding of private speech: the government may generally decline to fund an entire subject, but when it refuses to fund particular *perspectives* on that subject, it engages in viewpoint discrimination. In *Rosenberger*, for example, the Court held that a ban on funding of all religious expression was viewpoint-based because "the University d[id] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints . . . . The prohibited perspective, not the general subject matter, resulted in the refusal to [fund]." 515 U.S. at 831. Similarly, the "decency and respect" clause does not describe a prohibited subject matter, but discriminates against those treatments of

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[21] *See also* Letter of Assistant Attorney General Andrew Fois to Honorable Sidney R. Yates, Oct. 5, 1995 (setting forth views of the Office of Legal Counsel)(separately lodged with the Court).

otherwise includible subjects that an NEA official deems "disrespectful" or "indecent."[22]

The legislative history confirms the statute's viewpoint bias. The provision's author described it as establishing "a viewpoint that must be constantly taken into account," 136 Cong.Rec. 28631 (1990)(remarks of Cong. Henry), and promised that it would prevent the funding of art that offended the public's values, specifically citing Andres Serrano's *Piss Christ*. *Id.* at 28661. And the bill's co-sponsor promised that the clause would ensure that "works which deeply offend the sensibilities of significant portions of the public . . . not . . . be supported with public funds." *Id.* at 28624.[23]

The government argues that "general standards of decency" is nonetheless viewpoint-neutral because it limits only the "mode or form" of expression. Pet.Br. 39-41. This novel interpretation finds no support in the statute's language, was never advanced in the lower courts, and is contrary to the NEA's own implementation of the statute. Even if the statute actually drew such a distinction, it would be specious as a constitutional matter and unintelligible as an artistic standard. As Justice Kennedy recently observed,

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[22] The fact that the clause refers to the American public's "diverse" beliefs and values does not, of course, render it viewpoint-neutral. Whatever those values are, only "disrespect" is adversely considered. Moreover, as this Court noted in *Rosenberger*, the concept of viewpoint discrimination is not narrow and "bipolar"; where "multiple voices are silenced," the "debate is skewed in multiple ways." 515 U.S. at 831-32. *Amicus curiae* Morality in Media's argument that the "respect" clause should be saved from vagueness by "narrowly" interpreting it to mean "blasphemy" only highlights the law's viewpoint discrimination.

[23] In light of this clearly stated purpose, the government's suggestion that the "respect" prong was an effort to encourage the NEA to broaden the scope of artistic expression it funded is ludicrous. Pet.Br. 42-43. The last thing the 1990 Congress was interested in was *broadening* the scope of NEA funding.

"[i]n artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions' . . . Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, __ U.S. __, 116 S.Ct. 2374, 2415-16 (1996)(Kennedy, J., concurring). As the poet Wallace Stevens put it, "the style of a poem and the poem itself are one." Wallace Stevens, *Two or Three Ideas*, in OPUS POSTHUMOUS 257 (Milton J. Bates ed. 1989).[24] Picasso's *Guernica* would not have the same anti-war message if its imagery were less jagged, violent, and shocking. Aristophanes's *Lysistrata*, Chaucer's *Canterbury Tales*, or Shakespeare's comedies would not convey their respective messages without the puns, wordplay, and other stylistic choices that their authors made. *Cf. Cohen v. California*, 403 U.S. 15, 26 (1971)("we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process").[25]

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[24] *See also* Richard Weisberg, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 4 (1992)("As Cardozo noted years ago, and as every poet and storyteller understands, the carefully crafted utterance . . . unites the message with the medium -- indeed, is so constituted that the medium of linguistic expression is the meaning"); Cleanth Brooks, THE WELL WROUGHT URN 176, 183 (1947)(criticizing as "the heresy of paraphrase" the notion that an artwork's style can be separated from its meaning).

[25] The government seeks support in this Court's cases addressing "decency" restrictions in the broadcast media and public schools. But both are expressly limited to their settings, and were predicated on the fact that children were involved. Restrictions on vulgarity are permissible in public elementary and high schools because they are part of the government's legitimate inculcative function in that setting.

(continued...)

Citing language adopted at the same time Congress enacted the "decency and respect" clause, the government seeks to neutralize the clause's discriminatory terms by characterizing them as aimed not at suppressing controversial ideas, but at maintaining "public confidence" in the arts, and being "sensitive to the nature of public sponsorship." Pet.Br. 7, 39, 44. But as former NEA General Counsel Amy Sabrin candidly acknowledged, the latter terms are merely "coded language meaning, 'don't do anything too controversial.'"[26] The government's "public confidence" argument would justify refusing to fund controversial speech in any public program, for by definition supporting the expression of unpopular ideas will undermine public support. For example, Congressman Biaggi made just this argument in proposing to ban NEA funding of work that denigrates a minority group, a standard this Court recognized as viewpoint discrimination in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992).[27] On this "public confidence" theory, a state legislature could prohibit public universities from employing "subversive" professors, and the University of Virginia could have defended its exclusion of religious activities on the ground that such activities might undermine public support. *But cf. Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Rosenberger*, 515 U.S. 819.

The "public confidence" justification would swallow the First Amendment, for it is nothing more than a positive "spin" on the prohibited goal of suppressing dangerous ideas. Such rationales are presumptively suspect, because "speech may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Protecting people from offense does not justify viewpoint discrimination.[28] This is as true where the government is funding private speech as elsewhere. "Virtually every congressional appropriation will to some extent involve a

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[25] (...continued)
Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986). And as this Court noted only last term, the holding in *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726 (1978), was "emphatically narrow," *Reno v. ACLU*, __ U.S. __, __, 117 S.Ct. 2329, 2343 (1997), and was limited to the particularly invasive and child-accessible broadcast medium. The government cites *dicta* in the *Pacifica* plurality opinion to the effect that the FCC's regulation would limit only the mode of expression, and not the ideas expressed, 438 U.S. at 743 n.18, but the majority did not join that part of the opinion, and in any event the plurality did not suggest it was drawing such a distinction for all First Amendment purposes, which would have required overruling *Cohen v. California*. *See Reno v. ACLU*, 117 S.Ct. at 2344-48 (invalidating restriction on "indecency" on Internet, and distinguishing *Pacifica*).

[26] Amy Sabrin, "Thinking About Content: Can It Play An Appropriate Role in Government Funding of the Arts?", 102 Yale L.J. 1209, 1222-23 (1993). Ms. Sabrin wrote the article after leaving the NEA, and her views did not express the NEA's official position.

[27] *See* p.4, *supra*. Biaggi argued: "The point is there should be a sensitivity . . . . I think it's incumbent upon [the NEA] to be aware of it, in making grants, that you should sensitize the people that are receiving them. Let them know that there's a feeling out there that large groups of people don't like being offended." 1984 Grantmaking Hearing, *supra* note 1 at 3.

[28] *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991)("if it is the speaker's opinion that gives ofense, that consequence is a reason for according it constitutional protection"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989)("if there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *United States v. Eichman*, 496 U.S. 310, 318 (1990)("any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment").

use of public money as to which some taxpayers may object . . . . [But] this interest [cannot] be invoked to justify a congressional decision to suppress speech." *FCC v. League of Women Voters*, 468 U.S. 364, 385 n.16 (1984). The "public confidence" rationale turns on its head the Court's teaching that "regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law abridging the freedom of speech.'" *Id.* at 383-84.

B. The First Amendment Requires Viewpoint Neutrality Where, As Here, A Government Program Funds A Diverse Range Of Private Expression

No one disputes that had Congress prohibited artists directly from creating art that fails to conform to the "decency and respect" clause, the statute would be unconstitutional. The question is whether the fact that the restrictions operate as conditions on the support of private speech should alter the result. Plaintiffs maintain that it should not, just as it did not in *Rosenberger* and *Lamb's Chapel*. Those cases hold that where government is supporting private speech, it "may not favor some viewpoints or ideas at the expense of others." *Lamb's Chapel*, 508 U.S. at 394.

In *Rosenberger*, a student group challenged the University of Virginia's refusal to subsidize a religious magazine through its Student Activities Fund. Invoking *Rust v. Sullivan*, 500 U.S. 173, the University argued that it was merely declining to subsidize speech, not penalizing it directly, and therefore could discriminate against religious expression. This Court rejected that argument, and explained that *Rust* applies only where "the State is the speaker" or "disburses public funds to private entities to

convey a governmental message." *Rosenberger*, 515 U.S. at 833. Where the government "instead expends funds to encourage a diversity of views from private speakers," the Court held, viewpoint discrimination is forbidden. *Id.* at 834.

The critical distinction is between *government speech* programs, and programs designed to support a diverse range of *private speech*. Thus, the government could constitutionally require artists hired for a "Say No to Drugs" poster campaign to express that particular message in work created for the campaign, just as in *Rust* it could require the Title X family planning counsellors to express a pro-childbirth message. But it could not refuse to fund student magazines, which spoke not for the university but for the students themselves, on the basis of their religious viewpoint. *Rosenberger*, 515 U.S. at 834.

In the court of appeals, the government conceded that the NEA was not a government speech program. In a supplemental brief specifically directed to the consequences of *Rosenberger*, the government admitted that "the artistic expression funded by an NEA grant is not the government's own speech; the NEA's award of the grant does not constitute government approval of a particular message or point of view that may be communicated by the work of art; and public funds support a diversity of projects and productions within the overall arts program." NEA C.A. Supp. Br. at 3-4.[29] That concession controls here.[30]

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[29] *See also* Letter of Ass't Atty. Gen. Andrew Fois, *supra* n.21, at 2 ("the government's purpose in making NEA grants appears to be less to 'convey a governmental message' than to 'facilitate the speech of private persons' as understood in *Rosenberger*").

[30] The government seeks to evade *Rosenberger* by mischaracterizing the distinction the Court drew. The *Rosenberger* Court distinguished between government speech programs and programs designed to support

(continued...)

C. Viewpoint Neutrality Is Required In Government Funding Of The Arts Because The Arts, Like The Academy, Is A "Traditional Sphere Of Free Expression"

As both lower courts reasoned, the result here is also mandated by this Court's admonition in *Rust v. Sullivan* that government funding is not "sufficient to justify government control over the content of expression" in "traditional sphere[s] of free expression . . . fundamental to the functioning of our society." *Rust*, 500 U.S. at 199-200. Such "[t]raditional sphere[s] of free expression" include, for example, the public university, the press, and the public forum.[31] If government could control the content of private speech in these settings simply because it subsidizes the speakers or the speech, our "uninhibited, robust, and wide-open" public debate would be gravely threatened.

The government does not take issue with the lower courts' findings that artistic expression, no less than academic speech, journalism, or a soapbox address, is at the

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[30] (...continued)
a diversity of private speech. The government restates the distinction as one between government speech and "'for[a]' to encourage a dialogue on matters of public concern." Pet.Br. 28-29. But the *Rosenberger* viewpoint-discrimination principle is not limited to public fora or dialogues on matters of public concern. Even in nonpublic fora, where by definition the government has *not* opened public property for speech purposes, the First Amendment prohibits viewpoint discrimination. *Cornelius*, 473 U.S. at 806. And except in the special circumstances of public employment, the First Amendment imposes no threshold requirement that speech be on "matters of public concern" before it is protected against viewpoint discrimination.

[31] *Rust*, 500 U.S. at 199-200 (citing *Keyishian v. Board of Regents*, 385 U.S. at 603, 605-06; *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987)); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946)(postal subsidies may not be denied because magazine deemed "indecent").

core of a democratic society's cultural and political vitality. Pet.App. 80a-85a, 22a-23a. Congress recognized as much in creating the NEA. 20 U.S.C. §951(4)("democracy demands wisdom and vision in its citizens and . . . must therefore foster and support . . . access to the arts and the humanities"). The Senate Report confirms that the arts "'are at the center of our lives and are of prime importance to the Nation and to ourselves.'" S. Rep. No. 300, *supra*, at 7. Like universities and the press, art plays a critical checking function, providing alternative perspectives on the world and often challenging the status quo. This is why artists, along with universities and the press, are often the first targets of repressive regimes.[32]

A requirement of viewpoint neutrality is compatible with the NEA's function, just as it is compatible with the function of public universities, public forums, and the press. "A sense of freedom is . . . necessary for creative work in the arts." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)(Frankfurter, J., concurring). For precisely this reason, the NEA's enabling statute limits government control and guarantees "a climate encouraging freedom of thought, imagination, and inquiry." 20 U.S.C. §951(5) (1965). As Congress recognized, the NEA's function is not

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[32] *See generally* Moshe Carmilly-Weinberger, FEAR OF ART: CENSORSHIP AND FREEDOM OF EXPRESSION IN ART (1986); Stephanie Barron, ed., "DEGENERATE ART": THE FATE OF THE AVANT-GARDE IN NAZI GERMANY (1991)(catalogue from art exhibit examining Nazi Germany's condemnation of modern art). Moreover, repressive regimes often exercise control over art through selective allocation of funding. Liang Heng & Judith Shapiro, "Intellectual Freedom in China After Mao, With a Focus on 1983," at 79-86 (Fund for Free Expression Report 1984)(discussing China's use of subsidies through artistic associations to control artistic expression); Miklos Haraszti, THE VELVET PRISON: ARTISTS UNDER STATE SOCIALISM 7-8 (Katalin & Stephen Landesmann trans., 1987)(Communist Hungary exercised control over its artists through selective allocation of state subsidies).

only compatible with First Amendment principles of neutrality; its healthy functioning *demands* such neutrality.[33]

This is not to say, of course, that the NEA must be blind to content. Rather, the principles that govern NEA funding are akin to those that govern public universities. The Endowment may decide to fund sculpture rather than poetry, just as a university may decide to teach agriculture rather than astrophysics. And Endowment officials -- experts in the arts -- must review content to assess an applicant's artistic merit, just as a public university must consider the content of faculty and student work to assess its academic merit. But as the district court found, a public arts program requires artistic freedom in the same sense and for the same reasons that a public university requires academic freedom.[34] Just as it would violate the First Amendment for a state legislature to require tenure committees to disfavor scholarship that espouses views

[33] The NEA itself has recognized the necessity for neutrality. The Endowment's "Statement of Mission" declares that "it must not, under any circumstances, impose a single aesthetic standard or attempt to direct artistic content." *1992 Guidelines*, *supra* n.10, at 52. The 1990 amendments that gave rise to this litigation did not alter the underlying tenets of the NEA, namely to support excellent private art. Instead, Congress sought to superimpose on the NEA's judgments of "artistic merit and excellence" a screen to disfavor views deemed offensive to American "beliefs and values."

[34] The relation between academic and artistic freedom is more than an analogy; the two are inextricably interrelated. One of art's principal places of creation and study is the university; universities support museums, theater and film programs, publishing houses, and concerts. Pet.App. 84a. The principal national academic organizations have themselves recognized the importance of this link. *See* Pet.App. 85a (quoting 1990 Wolf Trap Conference Statement from leading academic associations on necessity for artistic freedom); Brief *Amicus Curiae* of AAUP, *et al.*

contrary to "American beliefs and values," so it violates the First Amendment to require the NEA to disfavor "indecent" or "disrespectful" artistic expression. Pet.App. 84a-85a.[35]

D. The Government's Approach Would Render Viewpoint-Discriminatory Selective Subsidies Self-Justifying

In an attempt to avoid the clear dictates of *Rosenberger* and *Rust*, the government argues that the NEA program falls somewhere *between* a government speech program and a program designed to support a diverse range of private expression. Pet.Br. 37. In this newly discovered "middle ground," the government maintains, the Court should uphold any criteria that Congress "rationally concludes, within the confines of the First Amendment, take into account the public interest." *Id.* But this "rational basis" standard is no different from the deferential scrutiny applied to government speech in *Rust v. Sullivan*.[36] The government's "middle ground" is an illusion.

[35] The government notes that it often allocates awards and prizes for expression, implying that applying First Amendment standards to such settings would somehow be unmanageable. Pet.Br. 49 n.22. In fact, government funding in "traditional spheres of free expression," such as scholarship, research, and the humanities, is generally allocated on standards of academic merit consistent with viewpoint neutrality. *See, e.g.*, 20 U.S.C. §956(c)(criteria for National Endowment for the Humanities); *see also* statutes cited at Pet.Br. 49 n.22. On the government's view, Congress would be free to require all of these programs to disfavor applicants who had expressed ideas that might offend the American public's "beliefs and values."

[36] Indeed, this standard may be entirely toothless. Arguably everything Congress does "takes into account the public interest." It would thus be difficult for an unelected federal court to second-guess Congress on whether the "public interest" was taken into account.

Moreover, the government makes no affirmative case for why the Court should identify a "middle ground." Instead, it merely advances four reasons for distinguishing *Rosenberger*, none of which is persuasive, and none of which is supported by precedent. The government is plainly sailing uncharted waters, and has provided the Court with no reason to depart from the clear guidance of its own precedents.

1. The NEA's Selectivity Does Not Justify Viewpoint Discrimination

The government argues first that the NEA program is materially different from the student activities program in *Rosenberger* because it is "highly selective." According to the government, this selectivity itself "gives rise to a distinctive 'communicative element inherent in the very act of funding itself,' namely that in the government's judgment, the project or work has artistic excellence and merit." Pet.Br. 35.

This argument cannot be squared with *Rosenberger*. The student activities program was also selective: of 135 applicants who applied for funding, 118 were funded and 17 rejected. 515 U.S. at 825. And the University's criteria could equally be said to give rise to a "distinctive communicative element" -- it supported only activities "related to the educational purpose of the University." *Id.* at 824. The government characterizes the NEA as "highly selective," Pet.Br. 33; in fact, the NEA has historically funded 60% of all applications from organizations, which are virtually the only funding recipients today; even after last year's budget cuts, the ratio is about 35%.[37] There is

[37] *See* n.4, *supra*. When individual and organizational applicants are considered together, the grant to application ratio is about two of seven. *See* n.5, *supra*.

simply no principled distinction between a program that funds nine of ten applicants and one that funds three of five or two of seven. Otherwise, the University of Virginia could resurrect its "religious" exclusion simply by making its program more selective. "[T]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Rosenberger*, 515 U.S. at 835.

The government's argument has no stopping place. Every time the government imposes a selection criterion on the allocation of a good, it will be able to argue that the act of selection contains a "distinctive communicative element." And without a principle for determining when a "selective" program becomes "highly selective," the government's argument reduces to a tautology -- the very imposition of selection criteria effectively immunizes the criteria from First Amendment review.

Even if it were somehow limited to merit-based programs in which applicants faced odds of two-in-seven or worse, the government's argument would have sweeping consequences. University teaching positions are generally more selective than two-of-seven, yet state legislatures cannot bar the employment of professors who advocate "politically incorrect" views. *Keyishian v. Board of Regents*, 385 U.S. 589; *University of Pennsylvania v. EEOC*, 493 U.S. 182, 195-99 (1990). Admission to many public universities is also more competitive than receipt of an NEA grant, yet the First Amendment would not permit the legislature to impose ideological criteria on the admissions process. *Cf. Sweezy v. New Hampshire*, 354 U.S. at 250; *id.* at 263 (Frankfurter, J., concurring). In short, the act of choosing which private speakers to fund, even where "highly selective," does not justify viewpoint discrimination.

2. Art Is Entitled To No Less Protection Against Viewpoint Discrimination Than Other Forms Of Speech

The government also maintains that viewpoint neutrality principles ought not apply because "the nature of art" is often more ambiguous than other forms of communication. Pet.Br. 30-31. But as this Court recently recognized, if the First Amendment protected only art that conveyed a "particularized message," "constitutional protection would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995).

The government's reliance on the sometimes ambiguous "nature of art" is especially disingenuous here, where the statute directs the NEA to disfavor art *precisely* when the agency understands it to convey a particular message -- one of disrespect for American values. It is only when a government official finds such a viewpoint that the statute's disadvantagous treatment is triggered. Whether or not art is sometimes abstract, the government's purpose in singling out art that offends "American beliefs and values" is plainly "aimed at the suppression of dangerous ideas." *Regan*, 461 U.S. at 550; *cf. Texas v. Johnson*, 491 U.S. at 414.

If anything, the ambiguity of art *increases* First Amendment concerns. Ambiguous, multilayered works are frequently censored precisely because they are misunderstood, interpreted too literally, or mistakenly reduced to simplistic messages.[38] Artists ask questions that may be misinterpreted, and often do so in provocative ways. Precisely because of the often open-ended "nature of art," the "decency and respect" clause is likely to drive both applicants and decisionmakers to "steer far wider of the unlawful zone" in the creation and judging of artistic works. Artists can only assume that irony and ambiguity will be construed against the creator.

3. The First Amendment Does Not Require An Empirical Showing That Government Regulation Has Skewed The Marketplace Of Ideas

The government also argues that the "decency and respect" clause should be upheld because the NEA funds only a small percentage of the art market, and therefore its criteria are unlikely to have a substantial chilling effect on public debate. Pet.Br. 38 n.12. This argument is flawed as an empirical and a legal matter. The government's only empirical support is a footnote in a law review article, based on a simple comparison of NEA grant funds to total nonfederal arts expenditures. *Id.* What the government neglects to mention is that the NEA exerts much broader influence over the art market than its own appropriations might indicate, because the combination of matching grants and the NEA's preeminence in the arts field means that substantial nonfederal support follows NEA support. Endowment grants generate a ten-fold match in matching funds.[39] And "despite the recent cutbacks, the Arts

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[38] *See* Wendy Steiner, THE SCANDAL OF PLEASURE 94-127 (1995)(noting that Salman Rushdie's intent in writing THE SATANIC VERSES was ambiguous and paradoxical, but those seeking to ban the (continued...)

[38] (...continued)
book were singleminded in their viewpoint-discriminatory purpose); *id.* at 117-18 (in censorship controversies, "literalism, the collapse of paradox, becomes the greatest threat").

[39] *See* note 11, *supra*; *see also Bella Lewitzky Dance Foundation v.* (continued...)

Endowment remains the largest single source of national leadership and support for the arts in America."[40] Accordingly, the government's argument that NEA funding is not very influential is directly contrary to the NEA's own claims.

More importantly, even if the empirical claim were accurate, the First Amendment does not tolerate viewpoint discrimination in small doses. The government twice concedes that "different First Amendment concerns could come into play if government funding manipulates or skews the 'marketplace of ideas' in a way that monopolizes the opportunity for free expression or effectively suppresses the communication of disfavored viewpoints." Pet.Br. 38 n.12, 47 n.21. But there is no measure for determining whether a particular government intervention has "skewed" the "marketplace of ideas" in this manner. The public debate is not susceptible to such microeconomic analysis.

The need for clear guidelines in the area of speech has led the Court to pretermit such unmanageable "effects" tests and instead to apply prophylactic rules. The prophylactic rule against viewpoint discrimination is predicated on a *presumption* that viewpoint discrimination skews the marketplace of ideas, *Simon & Schuster*, 502 U.S. at 116; *Rosenberger*, 515 U.S. at 832. This Court has never required an empirical showing that the marketplace of ideas was in fact skewed before invalidating content- or

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[39] (...continued)
Frohnmayer, 754 F.Supp. at 783 (noting NEA's "dominant and influential role in the financial affairs of the art world" and the "multiplier effect" of NEA funding); 20 U.S.C. §954(e)(requiring that NEA funding not exceed 50% of cost of project); *1999 Guidelines, supra* n.10, at 23 (describing "partnership agreements" with other arts funding agencies); *id.* at 11, 14, 17, 21 (matching grants requirements).

[40] National Endowment for the Arts, 1997 Strategic Plan, at http://arts.endow.gov/NEAText/Guide/Strategic/Intro.html.

viewpoint-based discrimination in government support of speech. *See, e.g., Rosenberger*, 515 U.S. 819; *Lamb's Chapel*, 508 U.S. 384; *Arkansas Writers Project v. Ragland*, 481 U.S. 221; *FCC v. League of Women Voters*, 468 U.S. 364; *Keyishian v. Board of Regents*, 385 U.S. 589.

4. The First Amendment Prohibits Viewpoint-Based Criteria Without Regard To Whether They Operate As Absolute Bars To Funding Or Negative Factors To Consider

Finally, the government argues that the "decency and respect" clause should be upheld because it merely prescribes factors that must be "take[n] into consideration" in judging grant applications, and not "categorical requirements" for funding. Pet.Br. 36. Again, the government offers no case support for this distinction, which is contrary to basic First Amendment principles.[41] Free speech jurisprudence is predicated on the peculiar vulnerability of speech to "chilling effects."[42] From the

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[41] The only "support" the government does offer is a misleading reference to the views of a legal task force to the Independent Commission, implying that it recommended that Congress adopt the "decency and respect" clause. Pet.Br. 44 (quoting Independent Commission, *A Report to Congress on the National Endowment for the Arts* 89 (Sept. 1990)). In fact, the task force's only formal contribution to the Commission report says precisely the opposite: "What [Congress] may not do . . . is to choose those to be funded -- and often more important, those *not to* be funded -- in a manner which punishes what Congress views as 'dangerous content.'" *Independent Comm'n Report* at 86.

[42] *Rosenberger*, 515 U.S. at 835 (noting that one of the "vital First Amendment speech principles" at stake in selective government funding is the "danger . . . to speech from the chilling of individual thought and (continued...)

standpoint of artists and institutions seeking NEA funding, it does not matter whether "decency" and "respect" are absolute bars or non-dispositive negative factors; in either event, applicants will be chilled from producing work that could run afoul of those criteria for fear of being denied funding. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

Viewpoint discrimination does not become permissible where it is one of several factors in a decision. If defendants' theory were correct, the University of Virginia could consider a student group's "religious" perspective as a negative factor in allocating student activity funds, the Postmaster General could consider a publication's "decency" in deciding whether to allocate mailing privileges, and a jury could consider a defendant's political beliefs as one factor in deciding what penalty to assign. This is not the law, and never has been. *Dawson v. Delaware*, 503 U.S. 159, 167 (1992)(First Amendment forbids reliance on defendant's abstract beliefs in sentencing, even as one factor among many); *Attorney General v. Soto-Lopez*, 476 U.S. 898 (1986)(civil service preference for New York residents violates right to travel, even though it is only one of many factors considered in whether one gets the job); *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984)(Breyer, J.)(First Amendment violated by Executive Order governing security

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[42] (...continued)
expression"); *City of Lakewood*, 486 U.S. at 757 (stressing propriety of facial challenges in First Amendment context to avoid chilling effects on speech); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)(heightened need for clarity in statutes affecting speech because of danger that speech will be chilled).

clearances that provides that a person's political associations "may be considered" as one factor in the determination).[43]

III. THE DECENCY AND RESPECT CLAUSE IS VOID FOR VAGUENESS

As the government's silence on the subject underscores, the "decency and respect" clause cannot survive any degree of vagueness scrutiny. One would be hard-pressed to find two people in the United States who could agree on what the "diverse beliefs and values of the American public" are, much less on whether a particular work of art "respects" them. Much like the licensing scheme in *Burstyn v. Wilson*, 343 U.S. 495, 504-05 (1952), the "decency and respect" clause sets decisionmakers "adrift upon a boundless sea amid a myriad of conflicting currents of . . . views, with no charts but those provided by the most vocal and powerful orthodoxies." Similarly, what standards of decency are "general standards of decency"? To the extent they are even ascertainable, such standards probably vary by generation, culture, ethnic identity, and geographical location. "Decency" is likely to mean something very different to a septegenarian in Tuscaloosa and a teenager in Las Vegas.

Thus, the government does not dispute the court of appeals' conclusion that the "decency and respect" clause

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[43] The government's theory would also require rewriting this Court's mixed motive doctrine, which provides that if an impermissible First Amendent consideration has played a motivating role in a government decision, the decision is unconstitutional unless the government can prove that it would have reached the same result without considering the impermissible factor. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87 (1977). Under the government's view, as long as the impermissible consideration was just one of several non-dispositive factors considered, there could be no constitutional violation, and there would be no basis for shifting the burden to the defendant to show that the factor in effect played no role.

specifies "'no standard of conduct . . . at all.'" Pet.App. 17a (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)). Instead, it makes two principal arguments: (1) the void-for-vagueness doctrine should not apply where government subsidizes speech; and (2) "decency and respect" are no more vague than artistic merit and excellence. Neither argument withstands scrutiny.[44]

A. Government Programs Allocating Subsidies To Private Speech Are Subject To Constitutional Vagueness Standards

The government cites no precedent for its view that statutes are exempt from void-for-vagueness scrutiny unless they are coercive. Pet.Br. at 46-49. It relies upon an analogy to *Rust v. Sullivan*, 500 U.S. 173, yet *Rust* itself expressly stated that the vagueness doctrine applies to funding decisions in "traditional sphere[s] of free expression . . . fundamental to the functioning of our society" *Id.* at 200 (citing *Keyishian*, 385 U.S. at 603, 605-06).

This Court has repeatedly applied vagueness standards to laws that affect intellectual inquiry in an academic

[44] In the last paragraph of its brief, the government also argues that the statute should not be invalidated because notwithstanding its earlier implementation, the NEA might someday remedy its vagueness through unspecified regulations. Pet.Br. 50. Such unadorned speculation about whether an agency might promulgate narrowing regulations cannot defeat a facial vagueness challenge to a statute governing speech. On this theory, the ordinance governing newsrack permits in *City of Lakewood* would not have been facially unconstitutional because the mayor might in the future have adopted a narrowing policy. But as the Court stated, the chilling effects created by such statutes "can be effectively alleviated only through a facial challenge." 486 U.S. at 757. In any event, §954(d)(1), like the loyalty oath invalidated in *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964), is not susceptible to a narrowing construction because it is "not subject to one or a few interpretations but to an indefinite number."

setting, even where only government employment -- a benefit -- is at stake. In *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961), *Baggett v. Bullitt*, 377 U.S. 360, and *Keyishian*, 385 U.S. 589, the Court held void for vagueness loyalty oath and anti-sedition requirements for public academic employment. In all three cases, the Court emphasized the dangerous chilling effect of laws restricting government-funded intellectual activity. *See Baggett*, 377 U.S. at 371-72; *Keyishian*, 385 U.S. at 599, 601 (finding that vague oath would "stifle 'that free play of the spirit which all teachers ought especially to cultivate and practice'")(quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952)(Frankfurter, J., concurring)).

Outside the academic setting, the Court has also applied First Amendment vagueness principles to noncoercive government programs affecting expression, in public forums, *see, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131-33 (1992); *City of Lakewood*, 486 U.S. at 770, and in non-public forums, *see Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 575 (1987). In each of these cases it could have been said that the government's "use of imprecise standards for awarding [benefits] does not penalize speech in any meaningful sense," Pet.Br. at 47.[45]

[45] Lower courts have routinely applied vagueness analysis to government programs that subsidize speech. *See, e.g., Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512-14 (9th Cir. 1988)(vague standards for film certification by U.S. Customs, including whether material "lends itself to misinterpretation or misrepresentation of the United States or other countries" or "augment[s] international understanding and good will"); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035-40 (D.C.Cir. 1980)(vague definition of "educational" for purposes of tax exemption); *Shamloo v. Mississsippi State Board of Trustees*, 620 F.2d 516 (5th Cir. 1980)(vague requirement of "wholesomeness" for student activity fund approval); *Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278, 295 (S.D.N.Y. 1992)(vague standard of "offensive[ness] to a majority of

(continued...)

As the district court found, vague laws governing the allocation of benefits to speech raise the same concerns that laws governing penalties pose: they fail to give fair notice of the governing legal standards; they chill excessive amounts of protected speech; and they invite arbitrary and discriminatory decisionmaking. Pet.App. 78a; *see also Keyishian*, 385 U.S. at 597-604; *City of Lakewood*, 486 U.S. at 757-58. Thus, there is no reason to excuse laws governing speech subsidies from all vagueness scrutiny. And even under the most minimal scrutiny, the "decency and respect" standard must fall.

B. Artistic Excellence Is Not Vague Because It Relies Upon A Common Core Of Professional Expertise And Does Not Create A Chilling Effect

The government argues that because "decency and respect" are no more vague than artistic excellence, it must be as permissible for the NEA to apply the former standard as it is to apply the latter. But standards of artistic merit, like standards of academic merit, are informed by a common language and education in the relevant discipline, and are applied by experts trained to make professional judgments. Moreover, artistic and academic merit standards do not exert the kind of chilling effect that "decency and respect" do.

This Court has recognized that public universities necessarily make judgments about academic merit, and has never intimated that such judgments are void for vagueness.

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[45] (...continued)
adults" for funding of health education materials); *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F.Supp. at 781-82 (vague requirement that NEA grantees certify that they will not produce works that "in the judgment of" the NEA, "may be obscene").

In fact, it defers to such judgments as long as they are made by professionals applying academic merit standards. *Board of Curators v. Horowitz*, 435 U.S. 78, 90 (1978); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *see also San Filippo v. Bongiovanni*, 961 F.2d 1125, 1137 (3d Cir.)(upholding academic merit standard against a vagueness challenge), *cert. denied*, 506 U.S. 908 (1992).

Academic merit is not vague because the term has gained meaning through a long history of application by professionals trained in making precisely those judgments. *Cf. Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 159 (1971)("character and general fitness" bar admission standard is not vague because "[l]ong usage in New York and elsewhere has given well-defined contours to this requirement"); *Gentile v. State Bar*, 501 U.S. 1030, 1049 (1991)(in assessing vagueness, courts should look to whether terms have "settled usage or a tradition of interpretation").[46] We all rely on such judgments: universities and law schools in admissions,

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[46] This explains the unanimity among circuit courts in recognizing the expertise of academics to make professional judgments about academic merit within their disciplines. *See, e.g., Gutzwiller v. Fenik*, 860 F.2d 1317, 1333 (6th Cir. 1988)(courts should generally defer to the expert judgments of academic professionals); *Zahorick v. Cornell University*, 729 F.2d 85, 93 (2d Cir. 1984)(courts must review tenure decisions for traditional evidence of bias, but cannot master academic fields sufficiently to second-guess peer judgments). Courts have also recognized and approved the widespread adoption by universities of the American Association of University Professors' (AAUP) standards, including peer review as a primary mechanism for determining academic merit. *See* David M. Rabban, "Symposium of Academic Freedom: Does Academic Freedom Limit Faculty Autonomy?", 66 Tex.L.Rev. 1405, 1408-10 (1988); *Browzin v. Catholic University of America*, 527 F.2d 843, 847 n.8 (D.C. Cir. 1975)(AAUP standards represent "widely shared norms within the academic community").

grading, hiring and tenure; and employers in determining whom to interview and hire.

The same is true of artistic merit. Here, too, there is a long tradition of professionals trained in the discipline who have developed and applied standards of artistic merit. Again, we rely on those decisions every day, in making judgments about whom to hire and admit in university arts programs, in deciding which artists to include in private and public museums and collections, and in determining who deserves public and private foundation grants. Artistic merit, like academic merit, is not reducible to a simple formula, but the profession nonetheless is guided by a set of consensus standards. Experts will, of course, differ in their judgments about these qualities, but at least they are speaking a common language derived from a common body of knowledge. The existence of disagreement about a standard does not make it wholly indeterminate.[47]

By contrast, "general standards of decency" and "respect for the diverse beliefs and values of the American public" have no common core of meaning, and no profession whose historical task has been to make judgments about them. While NEA officials "possess an expertise in determining 'artistic excellence and artistic merit' that will guide their application of these criteria; they have no

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[47] Indeed, this Court itself has relied upon judgments of artistic merit. Its obscenity doctrine distinguishes between protected and unprotected speech in part on the basis of an objective determination of "serious artistic value." *Miller* v. *California*, 413 U.S. 15, 24 (1973); *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). And such decisions often turn on expert critical evaluation, *see, e.g., Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964)(noting high critical regard enjoyed by Louis Malle's *The Lovers* in reversing an obscenity conviction); *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992)(reversing judgment of obscenity that disregarded credible expert evidence of a song's artistic value); *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934)(considering artistic merit in finding *Ulysses* not obscene).

corresponding expertise in applying such free-floating concepts as 'decency' and 'respect.'" Pet.App. 19a n.18.

Finally, standards of academic or artistic merit do not chill the exploration or expression of provocative, unconventional, unpopular, or "offensive" ideas. Artists and arts institutions competing for grants, like students competing for academic awards or professors competing for tenure, know by virtue of their education and their participation in the arts/academic community what the relevant standards of excellence are, and they are not likely to be chilled in striving to meet those standards by fear of ideological discrimination. "General standards of decency and respect for the diverse beliefs and values of the American public," by contrast, chill the type of provocative expression that is at the heart of academic and artistic freedom, and invite precisely the type of arbitrary and discriminatory decisionmaking that the void for vagueness doctrine guards against.[48]

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[48] These differences refute the government's claim that "decency and respect" are somehow implicit in the definition of "artistic merit." Pet.Br. 26,45. In fact, these critera flatly contradict principles of artistic excellence because the best art often questions conventional beliefs and provokes strong reactions. *See* Briefs *Amici Curiae* of Claes Oldenburg, *et al.*, Volunteer Lawyers for the Arts, *et al.*; J.A. 13 (statement by NEA Opera-Musical Theater Overview Panel that decency and respect are "irrelevant to the consideration of artistic excellence"). There are numerous great works of art or literature that could be considered indecent or disrespectful of the "beliefs and values" of some segment of the population, from Homer's *The Iliad* to Titian's *Rape of Europa* to Tony Kushner's *Angels in America*. *Cf. ACLU v. Reno*, 929 F.Supp. 824, 852-53 (E.D.Pa. 1996)(opinion of Sloviter, J.), *aff'd*, 117 S.Ct. 2329 (1997). Many of the world's greatest operas would likely fall prey to the "decency and respect" clause. Mozart's *Don Giovanni* features rape, promiscuity, and wife beating; Verdi's *La Traviata* includes prostitution and drinking; Puccini's *Tosca* concerns extramarital sex, torture, and sacrilege; Strauss's *Salome* features necrophilia; and

(continued...)

IV. THE "DECENCY AND RESPECT" CLAUSE IS AN UNCONSTITUTIONAL CONDITION

The decency and respect provision also violates the First Amendment because it imposes an unconstitutional condition on would-be recipients of NEA grants. The provision does not merely define or limit the use of government funds, but instead makes "decency" and "respect" part of "the criteria by which applications are judged." 20 U.S.C. §954(d)(1). Since "artistic merit" requires assessment of an applicant's prior work, the "decency and respect" restrictions extend beyond the government grant and reach work created solely with nonfederal funds. Any artist, curator, theater producer, or publisher who thinks she might apply for an NEA grant in the future will be chilled in the art that she creates today, for fear that an NEA official's judgment that it is "indecent" or "disrespectful" will count against her in the application process. J.A. 24-26.

Where government imposes a condition on speech that extends beyond defining the scope of speech in a funded program, "thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program," it violates the First Amendment. *Rust*, 500 U.S. at 196. In *FCC v. League of Women Voters*, 468 U.S. at 400, for example, the Court struck down an FCC requirement that public broadcasting stations refrain from all editorializing if they received any federal funds, because the requirement barred the station "from using even wholly private funds to finance its editorial activity."

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[48] (...continued)
Wagner's *Die Miestersinger* reflects anti-Semitism, while his *Die Walküre* highlights incest. *See also* Pet.App. 28a (Kleinfeld, J., dissenting)(noting indecent and disrespectful styles and themes in works of Chaucer, Shakespeare, Aristophanes, Nabokov, Twain, and Joyce).

By conditioning eligibility for an NEA grant on a consideration of whether applicants have produced "indecent" or "disrespectful" art on their own time and with nonfederal funds, the "decency and respect" provision similarly penalizes speech beyond the government program, and violates the First Amendment. As one court of appeals presciently explained:

> If public authorities conclude that they may . . . limit[] participation in certain activities by recourse to past speech, the following . . . [is] within the realm of possibility. In setting eligibility requirements for the admission of artists to a municipal exhibit of, say, political or historical works, authorities might specify the exclusion of artists who in the past had produced sexually explicit works. Such artists, therefore, may feel pressure to sanitize their labors out of a concern that they may be excluded from future exhibits.

Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 519 (1st Cir. 1989). The "decency and respect" clause has precisely that effect, and therefore imposes an unconstitutional condition.[49]

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[49] The courts below declined to reach this issue, but it is nonetheless an appropriate ground for affirmance. The district court believed that it could not consider how the statute would be implemented on a facial challenge, and that there was a dispute of fact concerning whether the NEA applies its criteria to applicants' past work. Pet.App. 79a. But courts may consider how a statute is implemented in adjudicating a facial challenge. *See, e.g., Forsyth County*, 505 U.S. at 131. And there is no dispute that the NEA considers prior work in making grant decisions. Plaintiffs identified this as an undisputed fact, J.A. 18, and defendants' statement of genuine issues did not dispute it. J.A. 74. The record contains uncontradicted evidence demonstrating that the NEA considers an applicant's past work in judging applications, including the
(continued...)

CONCLUSION

For all of the above reasons, the judgment of the court of appeals should be affirmed.

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[49] (...continued)
NEA's own guidelines. *See 1992 Guidelines*, *supra* n.10, at 58; *1999 Guidelines*, *supra* n.10, at 10-11, 14, 16-17, 20. The only evidence defendants submitted on this issue confirms that the NEA considers applicants' past work. J.A. 81 (former Deputy Chairman McAusland explains that panels "consider information pertaining to an applicant's relevant 'body of work' to assess the applicant's standing and significance in the relevant field"). Thus, no dispute of fact precludes decision on this aspect of plaintiffs' challenge, and it provides an alternative ground for affirmance.

The court of appeals reasoned that "the district court denied summary judgment . . . and this denial of summary judgment is not appealable." Pet.App. 3a n.1. In fact, the district court *granted* summary judgment on plaintiffs' sixth claim, which challenged the constitutionality of the "decency and respect" provision, and simply declined to grant relief on this particular argument in favor of that claim. It is well-established that this Court or the court of appeals may affirm a grant of summary judgment for any non-waived reason, including reasons rejected by the district court. *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE §3904, at 199-201 (1992). Plaintiffs advanced this argument to both lower courts, and this Court may properly consider it.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In our opening brief, we explain that the court of appeals erred, for three fundamental reasons, in holding that Section 5(d)(1) of the National Foundation on the Arts and Humanities Act (NFAH Act), 20 U.S.C. 954(d)(1), is unconstitutional on its face. First, the court of appeals misinterpreted Section 5(d)(1) to impose a rigid and inflexible test for public arts funding, rejecting out of hand the National Endowment for the Art's (NEA's) interpretation and implementation of the statute. Gov't Br. 20-25. Second, the court of appeals erred in subjecting the NEA grant program to First Amendment principles drawn from completely different contexts. *Id.* at 26-45. Third, the court of appeals erroneously concluded that Section 5(d)(1) is unconstitutionally vague, extending to the NEA funding context constitutional principles governing direct regulation of speech and forum access. *Id.* at 45-50. In taking issue with those points, respondents and their amici ask this Court to place extraordinary restrictions on Congress's traditional power to grant subsidies on a selective basis according to its conception of the public interest.

1. Respondents Are Wrong In Contending That The NEA's Interpretation Of Section 5(d)(1) Is Incorrect And Does Not Affect The Constitutional Inquiry

Respondents argue that Section 5(d)(1) "explicitly requires that 'standards of decency and respect for diverse values are considered when judging the artistic merit and excellence of an application.'" Resp. Br. 18-19 (quoting Pet. App. 8a). Thus, like the court of appeals, respondents and their amici rest their constitutional challenges on the premise that Section 5(d)(1) can be implemented in only one way—by "examin[ing] each grant application to determine if it comports with 'general standards of decency' and shows 'respect for diverse beliefs and values.'" Pet. App. 17a. That premise is incorrect, and embracing it inevitably distorts the constitutional inquiry.

a. Section 5(d)(1) directs the NEA to judge grant applications on the criteria of "artistic excellence and artistic merit," but it also provides that the NEA's procedures shall "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. 954(d)(1). Section 5(d)(1) does not state *how* the NEA should ensure that such "considerations" are incorporated into its evaluation process. The NEA has concluded that the statutory mandate can be satisfied by broadening the composition of its advisory panels to include a diverse array of artists and non-artists, reflecting a wide range of geographical and cultural perspectives, whose recommendations will necessarily embody their diverse experiences, perspectives, values, and beliefs. See Gov't Br. 23-25.

Respondents contend that the NEA's interpretation is "contrary to the statute's plain language" Resp. Br. 18. But Section 5(d)(1) nowhere states that the NEA must specifically apply "decency and respect" criteria to each individual application. Respondents' contrary argument (Resp. Br. 19 n.17) reads the words apart from their context and treats Section 5(d)(1) as less than a complete sentence.[1] Section 5(d)(1) is most sensibly read to direct that, when the Chairperson *establishes regulations and procedures*, she must ensure that: (a) applications are judged on the basis of artistic excellence and merit; and (b) "general standards of decency and respect for the diverse beliefs and values of the American public" are "tak[en] into consideration." Section 5(d)(1) gives the NEA considerable

[1] The NFAH Act requires the Chairperson to establish "regulations and procedures" for reviewing grant applications. NFAH Act § 5(d), 20 U.S.C. 954(d). Section 5(d)(1) supplements that requirement by stating:

> In establishing such regulations and procedures, the Chairperson shall ensure that * * * artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. 954(d)(1) (dash and paragraph number elided).

discretion to determine how to fulfill that obligation, and its chosen method of implementation rests on a permissible construction of the statute. *E.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 184 (1991). See Gov't Br. 21-22.

Respondents also err in contending (Resp. Br. 19) that the NEA's interpretation of Section 5(d)(1) to permit that approach is invalid because it is "redundant" of Congress's direction, in Section 10(c) of the NFAH Act, that the NEA employ diverse advisory panels. See 20 U.S.C. 959(c). As we note in our opening brief (Gov't Br. 24), the NEA's efforts to create diversely composed advisory panels go beyond what Congress required in Section 10(c). In any event, Section 5(d)(1) directs the NEA only to "ensure" that the stated factors are taken into consideration, and the NEA would satisfy Section 5(d)(1) if mere compliance with Section 10(c) "ensured" that result.[2]

b. Respondents contend that the NEA's interpretation "does not obviate the need to address the constitutional issues." Resp. Br. 16. They offer no persuasive reason why that is so. The government is entitled to fund art on the basis of a broadly based public assessment of artistic excellence and merit. Respondents do not assert that the NEA's use of diversely composed advisory panels to achieve *that* result violates the First Amendment. The NEA has further concluded that the collective judgment of

[2] Respondents contend that "the government's interpretation flies in the face of the clause's legislative history." Resp. Br. 20. They rely, however, on two ambiguous floor statements by one Representative. See *ibid*. Those statements are not necessarily inconsistent with the NEA's interpretation. In any event, the statements of other Representatives support the NEA's view that Section 5(d)(1) can be satisfied through procedural reforms. See Gov't Br. 24-25 & n.7. Respondents also rely on the minutes of a December 1990 meeting of the NEA National Council on the Arts in which the agency conducted preliminary discussions over how to implement Section 5(d)(1). Resp. Br. 20. The quoted passage, which suggested that advisory panel members could "bring their own definitions of these terms 'to the table,'" described the NEA's ongoing deliberations and did not state a formal and inalterable policy for implementing the provision.

diversely composed advisory panels also adequately "tak[es] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. 954(d)(1). The NEA's determination that a concededly constitutional advisory panel process satisfies those additional statutory provisions cannot render the otherwise constitutional process unconstitutional on its face.

2. Section 5(d)(1) Is Fully Consistent With The First Amendment

Respondents and their amici rest their First Amendment challenge on two basic premises. First, they contend that Section 5(d)(1) necessarily dictates impermissible "viewpoint discrimination" in awarding grants. Resp. Br. 21-22, 23-28. Second, they contend that the First Amendment does not allow the government ever to take account of viewpoint in its funding decisions, except in the narrow circumstances in which the government is itself the speaker. *Id.* at 22, 28-41. Neither contention is correct.

a. Respondents assert that Section 5(d)(1) "expressly disfavors private speech that fails to 'respect' the American public's 'beliefs and values' or offends its 'standards of decency.'" Resp. Br. 21. They further argue, on that basis, that Section 5(d)(1) is "a paradigmatic example of viewpoint discrimination." *Id.* at 23. Those statements rest on inaccurate characterizations of Section 5(d)(1).

First, Section 5(d)(1) does not expressly prohibit or disfavor funding of any proposal because of the viewpoint the proposal might convey. It merely directs the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. 954(d)(1). Assuming arguendo that that language must be applied to each individual grant application, it would merely require that those factors be "tak[en] into consideration" in the review process; it

would not require the NEA to give those factors any particular—much less controlling—effect.[3]

Second, Section 5(d)(1) does not require "viewpoint discrimination" as that concept is used in First Amendment jurisprudence. Even if the Court were to conclude that the challenged language must be applied on a grant-by-grant basis, it would not implicate the First Amendment's proscription against government suppression of unpopular perspectives or "dangerous ideas" (Resp. Br. 23). Reference to "general standards of decency," for example, is properly understood as a factor relating to the mode or form of art, rather than as a standard by which any intended or perceived message of the artist is judged. Gov't Br. 39-41; Cf. New School Amicus Br. 20 (NEA may consider whether a work is "too loud or too ugly").

This Court does, of course, carefully scrutinize challenges to government *regulation* of the form or mode of expression, because restrictions on the use of certain

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[3] Even in those limited situations in which "decency" and "respect" could be said to have any distinct meaning in the arts context (one can hardly imagine, for example, applying those terms to most musical works, landscape paintings, etc.), the NEA is under no obligation to "disfavor" art that is "indecent" or "disrespectful." See p. 15, *infra*. Section 5(d)(1) does not prohibit the NEA from funding any proposal that satisfies the ultimate test of "artistic excellence and artistic merit." Even those commentators who have questioned the wisdom of Section 5(d)(1) have recognized that the statutory provision has limited force. See K. Sullivan, *Artistic Freedom, Public Funding, and the Constitution*, *in* Public Money and the Muse 80, 94-95 (S. Benedict ed., 1991) ("The 1990 reauthorization legislation * * * did include some hortatory language urging the NEA chair to 'take into consideration . . . respect for the diverse beliefs and values of the American public.' This language is unlikely to be struck down on its face because, although vague, it has no teeth."); accord R. O'Neil, *Artistic Freedom and Academic Freedom*, Law & Contemp. Probs., Summer 1990, at 177, 187. In this litigation, respondents and their amici adopt an extreme and unwarranted interpretation of Section 5(d)(1), contrary to their own interests, to bolster the prospects that the Court might declare the statute unconstitutional. The Court should reject that litigation tactic and instead follow its settled practice of construing Acts of Congress in a manner that avoids unnecessary constitutional issues. See Gov't Br. 20.

modes, including "indecency," may affect the expressive force or impact of speech. See *Cohen* v. *California*, 403 U.S. 15, 26 (1971); *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2415-2416 (1996) (Kennedy, J., concurring). But contrary to the suggestions of respondents and their amici (see Resp. Br. 24-26 & n.25; Rockefeller Foundation Amicus Br. 19-24), that does not mean that "decency" regulation should be regarded as a form of impermissible viewpoint discrimination. See *Denver Area*, 116 S. Ct. at 2399 (Stevens, J., concurring). To the contrary, as Justice Stevens observed in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978): "A requirement that indecent language be avoided will have its primary effect on the *form*, rather than the *content*, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.* at 743 n.18 (plurality opinion) (emphasis added).

Respondents' contrary view rests on a misunderstanding of this Court's decisions addressing when the government may impose "decency" restrictions. See *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681-686 (1986); *Board of Educ.* v. *Pico*, 457 U.S. 853, 871 (1982) (plurality opinion); *Pacifica*, *supra*; see also *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 83 (1983) (Stevens, J., concurring). Respondents seem to believe that those decisions rest on a rationale that decency regulations are an allowable species of viewpoint regulation in certain "limited" situations where children are involved and where the government has a "legitimate inculcative function." Resp. Br. 25 n.25.

The reasoning in *Bethel*, *Pico*, and *Pacifica* does not rest on notions that "decency" restrictions can sometimes be upheld as a permissible type of "viewpoint" prohibition; indeed, in each of those cases the Court distinguished decency from viewpoint. Gov't Br. 40-41 & n.14. Rather, the reasoning in those cases rests on the different proposition that a mode of expression—be it profanity, vulgarity, loudness, or some other aspect of the expression—may play

"no essential part of any exposition of ideas," *Bethel*, 478 U.S. at 685 (quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)), and the government may therefore regulate those aspects of communication where sufficiently important countervailing societal interests are at stake. See *ibid.*; *Pico*, 457 U.S. at 871 (plurality opinion); *Pacifica*, 438 U.S. at 746 (plurality opinion). While the Court has most frequently applied that principle in the context of protecting children, it has never suggested that no other societal interest could justify restrictions on the mode or form of speech. See *Bolger*, 463 U.S. at 84 (Stevens, J., concurring) ("regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment").

Moreover, the Court has been attentive to the character of the challenged government activity when weighing the interests at stake. Significantly, the Court has forbidden the government from imposing indecency restrictions in precisely those situations in which the government may not draw distinctions among speakers based on governmental judgments about the excellence or merit of their expression. See *Reno* v. *ACLU*, 117 S. Ct. 2329 (1997) (Internet); *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989) (telecommunications); *Cohen* v. *California*, *supra* (public building). The NEA, by contrast, concededly *may* take the excellence or merit of the expression into account and, therefore, may consider decency as an aspect of that criterion.

In this case, of course, the government does not seek to regulate "indecent" expression at all. The only question is whether the NEA may "tak[e] into consideration" the mode of expression when evaluating applications to receive public funding. Cf. *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 270-271 (1988). Given the broad scope of the NEA's grant program and the wide variety of interests that may be implicated (including but not limited to interests relating to the education of children and the

public at large), it would be astounding to conclude that the NEA—which is otherwise *required* to take content into account in reviewing grant applications—could not even "consider" matters of decency.

Similarly, there is no merit to respondents' assertion that Section 5(d)(1)'s directive that the NEA take into consideration "respect for the diverse beliefs and values of the American public" mandates prohibitions based on viewpoint. That provision can reasonably be understood to *expand* the concepts of artistic excellence and artistic merit to include consideration of the full range of aesthetic values and preferences present in American culture. See Gov't Br. 42-43. If this Court concludes that the challenged provision of Section 5(d)(1) must be applied to individual grant applications, then the NEA can fulfill that mandate by considering whether the particular proposals adequately address the artistic needs, interests, and aspirations of the communities that will be served or convey a cultural perspective that has *not* been reflected in past projects. Such judgments, which manifest "respect for the diverse beliefs and values of the American public," do not in any meaningful sense result in invidious viewpoint discrimination.

Respondents reply to that point primarily by arguing that Section 5(d)(1) directs that "only 'disrespect' is adversely considered" (Resp. Br. 24 n.22)—that the statute "directs the NEA to disfavor art *precisely* when the agency understands it to convey a particular message—one of disrespect for American values" (*id.* at 36). Respondents, however, have simply assumed their conclusion. Section 5(d)(1) does not require the NEA to "adversely consider" artwork that demonstrates "disrespect" for any particular subset of the beliefs and values that exist in American culture. It merely directs the NEA to take into consideration "respect for the *diverse* beliefs and values of the American public." 20 U.S.C. 954(d)(1) (emphasis added). The NEA can fulfill

that directive without necessarily denying funding to what respondents describe as "disrespectful" art.

Respondents argue that the government's construction of Section 5(d)(1) is "ludicrous," but they base that dismissive characterization on nothing more than misleading snippets of legislative history. Resp. Br. 24 & n.23. The legislative record shows that Congress enacted Section 5(d)(1) in lieu of other legislative proposals for reforming the NEA grant program specifically because it did *not* impose the sort of funding prohibition based on viewpoint that respondents discuss.

As we explain in our opening brief (Gov't Br. 7-8), the House of Representatives considered three alternatives for reform of the NEA funding process: (a) the Crane proposal, which would have virtually eliminated individual NEA funding decisions; (b) the Rohrabacher proposal, which would have altogether barred NEA funding of art that denigrated "the beliefs, tenets, or objects of a particular religion" or "an individual, or group of individuals, on the basis of race, sex, handicap, or national origin"; and (c) the Williams/Coleman proposal, which ultimately became Section 5(d)(1). The House majority ultimately favored the Williams/Coleman proposal because it understood that the Rohrabacher proposal would prohibit funding based on viewpoint, but the Williams/Coleman proposal would not.[4]

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[4] Representative Rohrabacher envisioned that, under his proposal, art promoting Nazi expression and "sacr[ile]gious" art could not be funded. See 136 Cong. Rec. 28,639, 28,662 (1990). By contrast, the proponents of the Williams/Coleman proposal opposed the Rohrabacher amendment precisely because it would have imposed viewpoint-based prohibitions. They pointed out, for example, that:

> [I]f the Rohrabacher amendment is adopted, the flag series by Jasper John[s] which defaces the American flag could not be funded by NEA; a theater production of the "Merchant of Venice," which denigrates a religion, could not be funded by NEA; * * * D.W. Griffiths' classic film "Birth of a Nation" [which] denigrates a great American religion, could not be funded by the NEA.

Id. at 28,663 (Rep. Williams). See also *id.* at 28,624 (Rep. Coleman) (The Rohrabacher amendment would "put into legislative language

b. Respondents' entire argument in Part II of their brief is premised on the notion that Section 5(d)(1) requires invidious viewpoint discrimination. See Resp. Br. 21-41. If we are correct that Section 5(d)(1) does not compel the NEA to deny funding to particular projects on the basis of viewpoint, then there is no need for the Court to address the various points that respondents raise. We nevertheless turn to respondents' specific contentions.

(i). Relying on *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), respondents argue that the First Amendment requires viewpoint neutrality where "a government program funds a diverse range of private expression." Resp. Br. 28-29. *Rosenberger*, however, does not support respondents' position here. See Gov't Br. 27-37.

The Court ruled in *Rosenberger* that, when a University effectively establishes a limited forum for student expression, "viewpoint discrimination * * * is presumed impermissible when directed against speech otherwise within the forum's limitations." 515 U.S. at 829-830. The Court applied that principle to the University's provision of funding, stating that, while the University may impose viewpoint-based restrictions when the University "itself speak[s] or subsidize[s] transmittal of a message it favors," it may not impose such restrictions when it effectively creates a forum by expending funds "to encourage a diversity of views from private speakers." *Id.* at 834. The Court drew those distinctions for descriptive, rather than categorical purposes. Gov't Br. 27-29.

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specific activities and projects which may not receive funding by the NEA," and would "prohibit[] categories of expression."). Neither Representative Rohrabacher nor the supporters of his proposal attempted to dispel those concerns. To the contrary, Representative Rohrabacher complained vigorously that "the Williams-Coleman substitute * * * will, if passed, wipe out all the restrictions that my amendment places on NEA funding. * * * [T]he vote on the gut-the-standard Williams substitute is the key vote." *Id.* at 28,622. In short, the House enacted the Williams/Coleman proposal to avoid the very prohibitions that respondents (and their amici) now argue Section 5(d)(1) requires.

Respondents are accordingly mistaken in suggesting that *Rosenberger* establishes a stark dichotomy between "*government speech* programs and programs designed to support a diverse range of *private speech*" (Resp. Br. 29). The Court did not announce a new constitutional imperative that all government funding programs involving communicative activity must be analyzed as either supporting government speech or creating a forum for private expression, nor did it embrace the discredited notion that all First Amendment issues can be resolved through resort to mechanical rules. See *Denver Area*, 116 S. Ct. at 2384-2385 (plurality opinion). The Court did not indicate any intention to depart from its past decisions, which recognize that various types of expressive activity cannot be strictly categorized as either speech by private actors engaged in public discourse or speech by purely state actors. See *id.* at 2385.[5] Rather, the Court evaluated the case in light of the specific First Amendment interests at stake. See *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring).

Ultimately, respondents' Procrustean approach fails to give *any* account to the fact that the public also has a fundamental and constitutionally based interest in responsive representative government, including an interest in the expenditure of public funds and the nature of the artistic endeavors those funds may support. "It is precisely because we wish to use the First Amendment to establish a realm of public discourse in which persons are regarded as autonomous and self-determining that we impose strict

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[5] For example, broadcasters, university professors, and public school teachers engage in activities that, to varying degrees, involve aspects of both a private speaker and a public servant or fiduciary. See, *e.g.*, *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 198 n.6 (1990); *Hazelwood Sch. Dist.*, 484 U.S. at 270-273; *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984); *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 389 (1969); *Epperson* v. *Arkansas*, 393 U.S. 97, 113-114 (1968) (Black, J., concurring).

constitutional requirements of neutrality on state regulation of public discourse. And it is precisely because we wish our government to exemplify and to advance the particular norms of our community that we relax these requirements when the state is acting on its own account to support the nation's arts." R. Post, *Subsidized Speech*, 106 Yale L.J. 151, 192 (1996).

(ii). Respondents next contend that the government's funding must be "viewpoint neutral" because "the arts, like the academy, is a 'traditional sphere of free expression.'" Resp. Br. 30-33. Whatever the descriptive merits of this observation, it does not have particular pertinence to this case. First, even if the arts are a "traditional sphere of free expression," the First Amendment allows the government to impose standards in selecting what art proposals the public should fund. Second, even if both the academy and the arts serve the goals of free expression, that does not mean that arts funding should be subject to same First Amendment analysis as that applied in the university context. University decisions on hiring, retention, and tenure, for example, raise a set of complex and discrete First Amendment and personnel concerns that are far removed from issues related to arts funding. See, *e.g.*, *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 198-199 (1990). Finally, the academic freedom analogy does not, in any event, prove respondents' point. Whatever academic freedom means, it is not obvious that the concept is so inflexible that it would require a university publication that adopts an editorial standard of "academic excellence" to give no consideration to whether a submitted manuscript is crude or derisive. Similarly, it is not apparent that the concept is so absolute that it would require a university to be indifferent if a professor employed gratuitous profanity in the classroom or ridiculed students based on their

cultural values or religious beliefs. Cf. *id.* at 198-200 & n.7.[6]

(iii). Respondents next argue that "the government's approach would render viewpoint-discriminatory selective subsidies self-justifying" (Resp. Br. 33-34), by which they apparently mean that we have not, in their view, provided a sufficient basis, in their view, for distinguishing this case from *Rosenberger*. Their argument rests on four specific contentions. Each depends largely on a mischaracterization of the government's position, and each is unpersuasive.

First, respondents contend that "the NEA's selectivity does not justify viewpoint discrimination." Resp. Br. 34-35.[7] The NEA does not, however, rely on selectivity to "justify viewpoint discrimination." The NEA uses a competitive process, employing congressionally prescribed criteria of artistic excellence and artistic merit, to determine which art funding requests should receive federal grants. The funding program is not designed to facilitate the exchange of private views (*i.e.*, to create a forum), but rather to select from among many proposals a limited number that the NEA itself determines, through assess-

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[6] See also *Dambrot* v. *Central Michigan Univ.*, 55 F.3d 1177, 1190-1191 (6th Cir. 1995) (university coach dismissed for using racial epithets as a "motivational tool"); *Bishop* v. *Aronov*, 926 F.2d 1066, 1076-1077 (11th Cir. 1991) (professor disciplined for deviating from university-prescribed curriculum to promote personal religious beliefs), cert. denied, 505 U.S. 1218 (1992); see also *Hetrick* v. *Martin*, 480 F.2d 705, 709 (6th Cir.), cert. denied, 414 U.S. 1075 (1973); *Clark* v. *Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), cert. denied, 411 U.S. 972 (1973).

[7] Respondents concede that the NEA program "is selective," but they assert that it is not "highly selective" because the NEA historically awarded grants to two out of every seven applicants (including both individuals and organizations) and recently awarded grants to 35% of the organizations that applied. Resp. Br. 3-4, 34. Respondents do not mention that, when appropriations have been available for individual grants (such as respondent Finley received), the NEA has awarded such grants to less than 5% of the individual applicants. See Pet. App. 29a (Kleinfeld, J., dissenting).

ment of their content, best demonstrate "artistic excellence and artistic merit" and therefore warrant federal financial support. Gov't Br. 32-33, 35-36. The NEA's selection process should not be evaluated under principles that are designed to ensure that the government does not improperly restrict access to a forum for the free exchange of ideas. See *Rosenberger*, 515 U.S. at 829-830.

Second, respondents contend that "art is entitled to no less protection against viewpoint discrimination than other forms of speech." Resp. Br. 36-37. Contrary to respondents' assertions, we have not argued otherwise. See Gov't Br. 19, 30. The question here is not whether the NEA funding program constitutes government speech, subsidizes transmittal of a specific message the government favors, or creates a forum—it does none of those things—but instead whether Section 5(d)(1) is consistent with the First Amendment's core function of protecting individual freedom of expression. *Id.* at 37-45. We submit that Section 5(d)(1) does not harm any First Amendment value. Specifically, it does not result in invidious discrimination aimed at "the suppression of dangerous ideas." *Rust*, 500 U.S. at 192, 194; *Rosenberger*, 515 U.S. at 834; see *Regan* v. *Taxation with Representation*, 461 U.S. 540, 548 (1983).

Third, respondents contend that "the First Amendment does not require an empirical showing that government regulation has skewed the marketplace of ideas." Resp. Br. 37-39. We have not argued, however, that to establish a First Amendment violation one must always show a distortion of the marketplace of ideas. We simply recognize that a funding program is not wholly immune from First Amendment scrutiny and that the Court would be faced with a different case "if government funding manipulates or skews the 'marketplace of ideas' in a way that monopolizes the opportunity for free expression or effectively suppresses the communication of disfavored viewpoints." Gov't Br. 38 n.12; see also *id.* at 47 n.21. That is certainly not the case here. See Post, *supra*, 106 Yale L.J. at 192-194 & n.208; D. Shapiro, *Free Speech and Art Subsidies*, 14 Law & Phil. 329, 341-345 (1995).[8]

Fourth, respondents argue that "the First Amendment prohibits viewpoint-based criteria without regard to whether they operate as absolute bars to funding or negative factors to consider." Resp. Br. 39-41. The short answer, of course, is that Section 5(d)(1) simply does not require viewpoint discrimination in the sense that this Court has previously addressed, involving the suppression of ideas the government finds dangerous. But more fundamentally, there *is* a real difference between disqualifying factors and relevant considerations. Section 5(d)(1)'s identification of relevant considerations does not prevent anyone from receiving a federal subsidy, much less abridge any protected speech. See Independent Comm'n, *A Report to Congress on the National Endowment for the Arts* 89 (Sept. 1990) ("While a work of meager artistic quality should be disallowed because of inappropriateness for public funding, a work of great importance might warrant funding despite the same qualities of inappropriateness.") (quoting Prof. Michael McConnell).[9]

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[8] Respondents assert that an NEA grant for a particular art project may precipitate additional private financial support (Resp. Br. 37-38). That incidental consequence, however, would not amount to manipulating or skewing the marketplace of ideas. The NEA's decision to provide federal funding to a particular art project cannot be held to violate the First Amendment merely because private donors might make voluntary decisions to provide additional contributions.

[9] This case thus does not raise the central problem that was present in *Rosenberger*, where the University simultaneously created a forum "to encourage a diversity of views from private speakers" and at the same time "silence[d] the expression of selected viewpoints" within that forum. 515 U.S. at 834, 835. Contrary to the extreme characterization of respondents and their amici (see, *e.g.*, Resp. Br. 23, 28, 47 n.48), Section 5(d)(1) does not, on its face, silence or chill a speaker from engaging in free expression in any identifiable forum. An applicant remains free to engage in whatever artistic expression he wishes in whatever forum he chooses; he simply cannot dictate the standards by which his application for federal assistance will be judged.

The First Amendment provides that Congress shall make no law "abridging the freedom of speech." That freedom is presumptively "abridged" when Congress directly regulates private speech, or limits access to a forum it has established for free private expression, on the basis of content or viewpoint. But government subsidies, like private donations, *expand* the opportunity for private expression. Absent more (and no more is present here), they do not "abridge" the freedom of speech of those persons who are not subsidized.

3. Section 5(d)(1) Is Not Void For Vagueness

Respondents also contend that Section 5(d)(1) violates constitutional principles that prohibit vague proscriptions on expressive conduct. Resp. Br. 41-48. Respondents are unable to point to any situation, however, in which this Court has applied the "void for vagueness" doctrine to a federal grant program. Indeed, respondents' proposed principles are so broad as to suggest that even Section 5(d)(1)'s standard of "artistic excellence and artistic merit" would be vulnerable to a vagueness attack.

a. Respondents contend that "the government cites no precedent for its view that statutes are exempt from vagueness scrutiny unless they are coercive." Resp. Br. 42. That, however, is not what we argue. We contend only that the vagueness doctrine does not apply to congressional funding limitations, Gov't Br. 45-46, and it is *respondents* who can cite no precedent from this Court to the contrary.

Respondents rely on cases in which the Court invalidated government regulation of political speech as a condition of employment, *Keyishian* v. *Board of Regents*, 385 U.S. 589, 596, 597, 601 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360, 361, 364 n.3, 374 (1964); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961), and government regulation of access to a forum, *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130-133 (1992); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-759, 769-772 (1988); *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*,

482 U.S. 569, 570-571, 574-576 (1987). None of those cases involved a challenge to congressional limitations on a government grant program, and none presented a situation analogous to the one found here.

Respondents' inability to discover relevant precedent is not surprising. This Court developed the vagueness doctrine to address distinct problems that arise from government *regulation* of expressive conduct. The Court made that point in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972)—the case on which the court of appeals based its decision—where it explained that the vagueness doctrine rests on the concern that vague proscriptions on expressive conduct may (1) "trap the innocent by not providing fair warning"; (2) allow "arbitrary and discriminatory enforcement"; and (3) thereby "inhibit the exercise of [First Amendment] freedoms." *Id.* at 108-109. See Gov't Br. 46. That reasoning explains the cases that respondents cite.

The Court's decisions in *Keyishian*, *Baggett*, and *Cramp* reflect concern that the state statutes at issue could subject innocent public employees to sanctions for their private speech or association without fair warning, while the Court's decisions in *Forsyth County*, *City of Lakewood*, and *Board of Airport Commissioners* illustrate situations in which local ordinances could result in arbitrary denial of access to a forum.[10] Section 5(d)(1), by contrast, neither proscribes nor punishes expressive conduct nor denies a speaker use of a forum. It simply prescribes selection criteria for the award of federal grants. Those criteria can neither "trap the innocent" nor result in an "arbitrary" denial of a right to participate in the open discourse of a forum.

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[10] The latter three cases each arose in contexts in which government actors are completely prohibited from considering content. See, *e.g.*, *Forsyth County*, 505 U.S. at 130-131. Here, by contrast, the NEA provides subsidies on a competitive basis through the application of criteria that must *necessarily* take account of the content of the artists' proposals. See also p. 7, *supra*.

Respondents must ultimately retreat to the bare assertion that Section 5(d)(1)'s lack of precision will "chill excessive amounts of protected speech." Resp. Br. 44. This Court, however, has already rejected the premises underlying that argument. See Gov't Br. 47.[11]

b. Respondents' vagueness challenge also suffers from a fatal inconsistency. They contend that Section 5(d)(1)'s references to "general standards of decency" and the "diverse beliefs and values of the American public" are unconstitutionally vague, but Section 5(d)(1)'s reference to "artistic excellence and artistic merit" is not. Resp. Br. 44-47. According to respondents, the latter standard is sufficiently precise because it "relies upon a common core of professional expertise." *Id.* at 44.

Respondents' distinction rests on nothing more than their own particular opinion about who knows best what is "excellent" art. That opinion is certainly debatable.[12] Ultimately, there is little basis for saying that Congress's reference to "artistic excellence and artistic merit" is more objective or less "indeterminate" (Resp. Br. 46) than its references to "general standards of decency" and the "diverse beliefs and values of the American public." The

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[11] As we explain in our opening brief, if an applicant has no constitutional right to receive federal funding to communicate his views, and the government's denial of funding does not, as a matter of constitutional law, impose a penalty on his right of free expression, then it is far-fetched to suggest that the Constitution nevertheless requires the government to articulate specific funding criteria to avoid "chilling" the applicant's speech. See Gov't Br. 47. See also note 13, *infra*.

[12] As respondents acknowledge, art professionals frequently disagree over the merits of a particular work. Resp. Br. 46. Indeed, history is replete with examples of artists whose work was rejected by contemporary art "professionals" but embraced by those of another age, as well as examples of artists whose work enjoyed contemporary but fleeting acclaim. There is nothing illegitimate in the view that "it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can." *Pope* v. *Illinois*, 481 U.S. 497, 504 (1987) (Scalia, J., concurring).

NEA has recognized that all of Section 5(d)(1)'s provisions entail imprecise and arguably subjective judgments, and it has properly attempted to implement all of those provisions through the use of diversely composed advisory panels, composed of both artists and non-artists, that will ensure that the NEA's funding decisions are based on a broad public perspective. Respondents urge, by contrast, that the Constitution requires that Congress allow for consideration only of "artistic excellence and artistic merit," without elaboration, and that it must rely solely on art "professionals" in determining what art the public may fund.

The difference in perspectives is significant. The NEA's approach is consistent with the language of Section 5(d)(1) and it ensures, in accordance with the purposes of the Act, that the NEA's funding decisions are "sensitive to the nature of public sponsorship" and "contribute to public support and confidence in the use of taxpayer funds." See NFAH Act § 2(5), 20 U.S.C. 951(5). Respondents' approach would minimize the public's participation in the application selection process and would subject the NEA grant program to a "professional" orthodoxy.[13]

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[13] Respondents raise the additional argument, not relied upon by the court of appeals, that Section 5(d)(1) creates an unconstitutional condition by "conditioning eligibility for an NEA grant on a consideration of whether applicants have produced 'indecent' or 'disrespectful' art on their own time and with nonfederal funds." Resp. Br. 48-49. That argument has no basis in law or fact. Section 5(d)(1) *allows* the NEA to consider a grant applicant's past work in evaluating whether the proposed work could be expected to demonstrate "artistic excellence and artistic merit," but the NEA examines only those work samples that the applicant elects to submit. See NEA FY 1999 *Grants to Organizations: Application Guidelines* 28, 31-40 (Dec. 1997). Neither Section 5(d)(1) nor the NEA's review process conditions an applicant's eligibility for a grant on "whether applicants have, in the past, produced 'indecent' or 'disrespectful' art." *Id.* at 49. There is accordingly no merit to respondents' suggestion that Section 5(d)(1) "effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust*, 500 U.S. at 197.

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For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS,

Petitioner,

—v.—

FINLEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF MORALITY IN MEDIA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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No. 97-371

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BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

Morality in Media, Inc. ("Amicus"), as Amicus Curiae, files this brief in support of the Petitioners in this case, which is before this Honorable Court on the merits under the provisions of Rule 37(3)(a). The written consents of the Petitioners and Respondents have been requested and all parties have consented thereto in writing. The written consent of the Solicitor General has been filed by him with the Court. A copy of the written consent of the Respondents is being filed concurrently with this brief. Morality in Media has a special interest in this case because this organization has through the years posited indecent material as proscribable under appropriate circumstances.

Morality in Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states, and its Board of Directors and Advisory Board are composed of prominent businessmen, clergy and civic leaders.

The Founder and President of Morality in Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report" of the Commission, which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 58, notes 7 and 8 (1973). Morality in Media has also frequently participated as Amicus in cases before this Court, including *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Sable Communications v.*

FCC, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 116 S.Ct. 2374 (1996); and *American Civil Liberties Union v. Reno*, 117 S.Ct. 2329 (1997).

Morality in Media is filing this brief in support of the Petitioner because it believes its brief contains relevant matter that may not be brought to the attention of the Court by the parties.

SUMMARY OF ARGUMENT

Amicus first points out to this Honorable Court that the Respondents do not have a viable cause of action simply because they were applicants for a federal subsidy since there is no constitutional right to be subsidized by the american public. If there is any vagueness in the N.E.A. language, it does not give rise to discrimination or denial of First Amendment rights as to the Respondents. There is no cognizable injury as to them. While it is true that governmental subsidies may not be based on viewpoint discrimination, the language under contest does not discriminate on the basis of viewpoint or prohibition of the promulgation of ideas, it only requires that the N.E.A. "take into consideration" the manner of presenting their views and ideas. Amicus postulates that since the criteria for a grant or fellowship is "artistic excellence" or "artistic merit", then the requirement to "take into consideration" respect for the diverse beliefs and values of the American people would not prevent the N.E.A. from determining in any or all applications for a grant that the criteria overrides any indecency or blasphemy. In other words, there is no prior restraint or discrimination even if vagueness inheres in the language because the statute does not provide that you shall not receive a grant if your proposed work is indecent or blasphemous.

Next Amicus suggests that the phrase "General Standards of Decency" is not vague. It points out that, since First Amendment rights or criminal penalties are not implicated, the scrutiny, relative to imprecision, should be relaxed as in the determination of whether vagueness exists in non-criminal, non-First Amendment cases. It then goes on to indicate that that phrase is not vague since one, it has been "defined" by this Honorable Court, two, various cases have said that "indecent" is not vague under their interpretation of Pacifica,[1] and lastly that it means the same as "Contemporary Community Standards" when used as a valid rule to determine prurient appeal and patent offensiveness in obscenity cases.

Amicus next turns its attention to an analysis of the words "Respect for the Diverse Beliefs and Values of the American People" and suggests that any vagueness inherent in that phrase can be cured by the Court by authoritative construction. Adverting to the debate in the House and Senate in order to discern what was on the minds of the legislators when they voted in favor of this clause, it finds that the issue that incensed those who spoke were the Serrano (Piss Christ abomination) and the Mapplethorpe (Bull Whip Homoerotic) production both of which had apparently been financed by N.E.A. grants. An examination of the debates indicate a preoccupation with these two works. Since the Mapplethorpe exhibit was a sadomasochistic scene such would be covered by the obscene or decency language of the N.E.A. The Serrano effort, was pure blasphemy. Amicus therefore urges this Honorable Court to conflate the term "Respect for the Diverse Beliefs and Values of the American People" to "taking into consideration whether or not blasphemous."

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[1] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Finally, Amicus urges this Court to sever this phrase if it finds it vague or incapable of a constitutional authoritative construction leaving a requirement "to consider" the "General Standards of Decency".

ARGUMENT

I. The Respondents Do Not Have A Viable Cause of Action Since No Constitutional Rights Are Being Violated

It may be true, in an abstract sense, that the Respondents have suffered some damage by denial of fellowship by the N.E.A. If so it is "damnum absque injuria."

The denial of fellowships does not translate into a legally cognizable cause of action against the N.E.A. In fact, it would appear that they suffered no legal injury. Their claimed "injuria" is that they have been denied constitutional rights by reason of the claimed vagueness and viewpoint discrimination of the 1990 Amendments to the N.E.A. Act. However, no where in the Constitution do we find that vagueness of an Act creating such a subsidy gives rise to a cause of action. The viewpoint discrimination argument fails insofar as "General Standards of Decency" is concerned since no "idea" is proscribed, but only the manner of expressing the same. It is the view of Amicus that the phrase "Taking Into Consideration Respect for the Diverse Beliefs and Values of the American Public", if authoritatively construed by this Honorable Court to be conflated by authoritative construction into the words "Taking Into Consideration Whether or not Blasphemous", would avoid both vagueness, overbreadth, and viewpoint discrimination. It is apparent that one may express a belief that no God exists or rail against such a belief in a manner that avoids

blasphemy. Again it is not the idea, but the manner of expression of the same that is being "considered".[2]

As we indicate below in Argument II, the phrase "General Standards of Decency" is not vague, nor as indicated in Argument III, neither is the phrase "Whether or not Blasphemous."

Amicus submits at this point that there is no denial of a subsidy based on viewpoint. All are treated equally. All may apply. All may express any viewpoint they may advocate provided they do so in a decent and non-blasphemous manner, including a viewpoint that indecency is a good thing and should not be regulated or that "There is no God." It is not the promulgation of an idea, but the manner in which it is attempted or accomplished that may be regulated.

Just as 18 U.S.C. 1464 does not forbid the promulgation of ideas, but only the manner in which they are presented, so too would the phrases "General Standards of Decency" and "Whether or not Blasphemous" not prohibit consideration of various viewpoints if expressed appropriately. It is to be observed that 18 U.S.C. 1464 prohibits the use of obscene, indecent, or profane language none of which has yet been found unconstitutional as viewpoint oriented. The use of the word "profane" in 1464 augurs well for the use of the word blasphemous in the

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[2] It is well to note, at this point, that Indecency and Blasphemy, under such a construction as Amicus proposes, is not forbidden in a grant application. Theoretically, the N.E.A. could determine that either "artistic excellence" or "artistic merit" overrides any indecency or blasphemy (954(d)(1)).

construction suggested by Amicus.[3]

Representative Shumway, during debate on the 1990 revision of the N.E.A. said:

> "Nowhere is it written that artists . . . are entitled to 'no strings' federal support. Where Uncle Sam giveth, Uncle Sam generally establishes conditions and criteria concerning applicants for the 'gift.'"[4]

Mr. Weiss of New York, on the opposite side of the debate, claimed that the language now under consideration denied First Amendment Rights stating:

> "The Supreme Court has repeatedly held that the First Amendment does not disappear because the taxpayer picks up the tab. In a unanimous opinion in 1983, Chief Justice William Rehnquist wrote:
>
> > 'Neither by subsidy or penalty may the government aim at the suppression of dangerous ideas.'"[5]

Now, as previously indicated, insofar as we are considering "Consideration" of "General Standards of Decency," the suppression of ideas concept put forward by Representative Weiss has no application. By this language we are not prohibiting the consideration of an idea (however

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[3] "Profane" is defined as "to treat (something sacred) with abuse, irreverence or contempt". Websters New Collegiate Dictionary. (7th ed. 1969).

[4] 136 Cong. Rec. H9437 (Oct. 10, 1990) (statement of Rep. Shumway).

[5] 136 Cong. Rec. H9448 (Oct. 11, 1990) (statement of Rep. Weiss).

vile) but the manner of its presentation based, as Chaplinsky[6] says, on the social interest in order and morality.

Insofar as we suggest the conflation of "and respect for the diverse beliefs and nature of the American public" into the term, "whether or not blasphemous" we are not prohibiting a discussion or an expression of a view that blasphemy is desirable or should be permitted. We are suggesting, by this language, that such expressions should not be expressed by the use of blasphemous words or images, and that, if they are, the N.E.A. in making grants will take that fact into consideration as one of the factors (but not necessarily a controlling one) in making its decision.

The case of Rust v. Sullivan[7] supports the right of the N.E.A. to take indecency and blasphemy into consideration. As was said there:

> "The government has not discriminated on the basis of viewpoint, it has merely chosen to fund one activity to the exclusion of the other."

The Rust case concepts apply to both "General Standards of Decency" and "Whether or not Blasphemous." Congress, under Rust, can establish such criteria especially where there are alternate means of communicating indecency and blasphemy by private funding.

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[6] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[7] 500 U.S. 173, 193 (1991).

II. The Phrase "Take Into Consideration General Standards of Decency" is not Unconstitutionally Vague.

1. The Vagueness Doctrine is Normally Confined To Criminal Cases.

It is a fundamental principle of due process that the state may not hold an individual criminally liable for conduct which he could not reasonably understand to be proscribed. United States v. Harriss[8]; Grayned v. City of Rockford[9] (Emphasis Supplied).

Both the Coates[10] case and the Gougen[11] cases quoted below by the Ninth Circuit, were criminal cases. The Coates case quotes for its authority Connally v. General Construction Company[12] but that too, involved a criminal situation.

2. When the Vagueness Doctrine is Applied to Non Criminal Cases Greater Tolerance of Imprecision is the rule

It is clear that where a man must act on peril of criminal prosecution the doctrine of vagueness has clear applicability but this is not so where no criminal penalties are

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[8] 347 U.S. 612 (1954).

[9] 408 U.S. 104 (1972).

[10] *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

[11] *Smith v. Gougen*, 415 U.S. 566 (1974).

[12] 269 U.S. 385 (1926).

involved.

As this Honorable Court has told us, there is greater tolerance of enactments with civil rather than criminal penalties. because the consequences of imprecision are qualitatively less severe Village of Hoffman Estates v. Flipside.[13]

This Supreme Court in Hoffman Estates[14] said:

> "These standards (for evaluating vagueness) "should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair enforcement-depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."

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[13] 455 U.S. 489 (1982).

[14] at 455 U.S. 498.

An applicant for a grant is not going to be taken by surprise by the requirements of the N.E.A. statute. It will be well known to him or her by the nature of the grant process and his inquiry to the N.E.A. He or she, as the Hoffman Estates case says, "Can be expected to consult relevant legislation in advance of action". In addition, the N.E.A. Chairperson is authorized and directed to issue administrative regulations under Section 954(d). Just as the FCC clarified the meaning of "indecent" in Pacifica, so too can the Chairperson clarify the meaning of "General Standards of Decency".[15]

In Winters v. New York,[16] we find at page 515 the following:

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."

There are a number of lower court cases that indicate that unless there is fine or imprisonment involved, the standard of certainty is relaxed. As was said in one of them, Ross v. Springfield School District,[17] "The void for vagueness doctrine is generally confined to penal sanctions."

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[15] "The theme that, 'The constitution does not require impossible standards' *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947) is a frequently recurring one in the Court's opinions...It has consistently sustained statutory formulas of relationships where more precise articulation would have been incapable of administration." A.G.A., *The Void For Vagueness Doctrine in the Supreme Court*, 109 Pa. L. Rev. 67-116 (1960).

[16] 333 U.S. 507 (1948).

[17] 641 P.2d 600, 607 (Or. Ct. App. 1982), *rev'd other grounds*, 657 P.2d 188 (Or. Sup. Ct. 1982).

In D.C. v. City of St. Louis,[18] the Eighth Circuit said at page 654:

> "When violations carry criminal penalties, a strict test of specificity is applied in reviewing the vagueness of a statute."

In Keefe v. Library of Congress,[19] the District Court says:

> "Vagueness scrutiny under the Due Process Clause is applied with varying force depending on the circumstances. It applies less strictly to enactments concerned with economic regulation, those involving only civil penalties, and those that contain a scienter requirement which mitigates the problem of adequacy of notice. It applies with greater strictness to criminal laws, and laws implicating constitutionally protected rights, such as the First Amendment...A final factor affecting the strictness of the vagueness determination is the existence of any administrative avenue by which the employee can resolve any ambiguity as to the meaning of the regulation at issue and its applicability to the employee's conduct."

The Fifth Circuit in Harper v. Lindsay,[20] stated:

> "The prohibition against excessive vagueness does not invalidate every enactment which could have been drafted with greater precision".

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[18] 795 F.2d 652 (8th Cir. 1986).

[19] 588 F.Supp. 778 at 789 (D.D.C. 1984) *modified on other grounds*, 777 F.2d 1573 (D.C.Cir. 1985).

[20] 616 F.2d 849 at 851 (1980).

As indicated, in Argument I above, the artist does not have a First Amendment right to obtain or be considered for a N.E.A. grant. His work is not being modified, banned or prohibited. He or she retains his or her Freedom of Speech and Freedom of the Press. The other factors mentioned by the Eighth Circuit and prior decisions of this Honorable Court indicate that relaxed scrutiny should be applied since the appellant for a grant can consult the N.E.A. rules and regulations for clarification of the phrase "General Standards of Decency" or "Diverse Beliefs and Values of the American People". If dissatisfied with a rule or regulation or its application he or she may, assuming standing exists, seek review in an appropriate legal tribunal.

3. The Phrase "General Standards of Decency" Is Not Unconstitutionally Vague.

This Honorable Court has not had any great difficulty in the past in finding that the word indecent has a generally accepted meaning. This Honorable Court has given us its interpretation of the word "indecent" as used in 18 U.S.C. 1464 when it said in FCC v. Pacifica Foundation, at 98 S.Ct 3035:[21]

> "The normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality.'

[21] The *Pacifica* court also tells us at page 3039:

"These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said, 'Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality', *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)."

At 3036, in footnote 15, that Court says of Justice Harlan's opinion in Manual Enterprises v. Day,[22]

> "At one point, he used 'indecency' as a shorthand term for 'patent offensiveness'.

The Southern District of New York in Shea v. Reno,[23] stated:

> "Section 223(d)" (of the CDA) "essentially codifies the FCC definition of indecency sustained in a particular factual context by the Supreme Court in Pacifica. Although the Pacifica Court never specifically addressed whether the FCC's definition was unconstitutionally vague, the Court's conclusion that the broadcast at issue was "indecent" and the fact that the Court quoted elements of the FCC's definition of indecency with approval, see 438 U.S. at 789, has been read to foreclose a vagueness challenge to the FCC's definition of indecency for the broadcast medium. See Act I, 852 F.2d 1339-40."

Other cases also indicate that adopting the FCC's Pacifica definition in other media cures any potential vagueness.[24]

[22] 370 U.S. 478 (1962).

[23] 930 F.Supp. 916,935 (1996).

[24] *Cf., Alliance For Community Media v. FCC*, 56 F.3d 105, 129 (D.C. Cir. 1995); *Dial Information Services Corp. of New York v. Thornburgh*, 938 F.2d 1535, 1540 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992); *Information Providers Coalition v. FCC*, 928 F.2d 866, 876 (9th Cir. 1991).

It is interesting to note the opinion of Judge Dalzel in ACLU, et al. v. United States Department of Justice, 929 F.Supp. 824, 868-870 (E.D. Pa. 1996) holding that the definition of indecency used in the CDA was not vague and saying at 868:

> "These cases recognize that the FCC did not define indecency for cable and dial-a-porn in a vacuum. Rather it borrowed from...Pacifica."

Now it is apparent that, we are, in the instant case, determining whether the phrase "Standards of Decency" is vague or whether the word "Decency" itself is vague. It is obvious that the word "Decency" simply means "Not Indecent"-so once having determined the meaning of "Indecent" we have clarified the term "Decency". This Honorable Court has already defined Indecent in the Pacifica case as "Non Conformance With Accepted Standards of Morality". This Honorable Court, could if it wished authoritatively construe the word "Indecent" to have the meaning found by the FCC in Pacifica. We urge this Honorable Court to stick with it's prior definition and rule that "Conformance With Accepted Standards of Morality" cures any vagueness. After all, this is the Court's own definition.

One might argue that accepted standards of morality is in itself vague. To answer this we draw the attention of the Court to the elements of the obscenity definition. The test for the two prongs of the obscenity triad is determined by the applications of contemporary community standards to determine patent offensiveness and prurient appeal. Since this is not vague how can Accepted Standards of Morality be vague? The application of community standards is the application of accepted standards of morality relative to sexual matters. As Judge Hand said in 1913, obscenity is the critical point between candor and shame at which the community may have arrived here and now. Both Prurient

Appeal and Patent Offensiveness are morality terms and, in effect, to determine if something appeals to pruriency and is patently offensive we must apply the discerned community "Standards of Morality" in relation to the object or works at issue.

The Supreme Court did not find objectionable the charge to the jury found in Hamling v. United States,[25]:

> "The trial court instructed the jury that it was to judge the obscenity . . . of the brochure by reference to 'what is reasonably accepted according to the contemporary community standards of the community as a whole . . . Contemporary Community Standards means the standards generally held throughout this country concerning sex and matters pertaining to sex. This phrase means, as it has been aptly stated, the average conscience of the time and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now."

It is clear that the obscenity definition and the first and second prong thereof, are judged by the morals of the community and the suggested tests cause no unconstitutional vagueness. If this is so, then there is no vagueness in "accepted standards of morality." We already are using this to determine obscenity. "Shame" is a "morality" word.

As was said in Burstein v. United States,[26] obscenity offends the common sense of decency and modesty of the

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[25] *Hamling v. United States*, 418 U.S. 87, 102 (1974).

[26] 178 F.2d 665, 667 (9th Cir. 1949).

community or as said in United States v. Wedelstedt,[27] "Community standards are aggregates of the attitudes of average people."

If we refer to Pacifica we find that the governmental justification for inhibiting indecency is squarely based on morality when the Court quoting Chaplinsky, indicates that "any benefit is outweighed by the social interest in order and morality". We are therefore justified in using as our touchstone "Conformity with Accepted Standards[28] of Morality" as a phrase equal in clarity to Contemporary Community Standards and as discernible.

III. Whatever Vagueness Inheres in the Phrase "The Diverse Beliefs and Values of the American Public" can be Cured by Authoritative Construction.

It is fundamental law that an Act of Congress will, in the first instance, be presumed to be constitutional and if there is curable uncertainty that it will be authoritatively construed by this Honorable Court so as to render it constitutional.

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[27] 589 F.2d 339, 349 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979).

[28] Black's Law Dictionary (6th ed. 1990) refers to the word "standard" as meaning stability, general recognition and conformity to established practice, *Standard Accident Ins. Co. v. Standard Surety and Casualty Co.*, 53 F.2d 119,120 (S.D.N.Y. 1931).

The concern of Congress in enacting the 1990 Amendments to the N.E.A. and especially 954(d)'s language relative to "Respect for the Diverse Beliefs and Values of the American Public" was, as Amicus interprets the debate, a belief that prior grants by the N.E.A. especially, "Piss Christ" by Serrano should not have been awarded since they denigrated the dignity of a person believed by a majority of the American Public to be God Almighty and the further belief that Congress should not "sponsor" such efforts. This is made clear by the quotations from the Congressional debates." The Rohrbacher amendments (which were not adopted but illustrate the concern) prohibited inter alia,

> "Federal funds . . . that denigrates religious beliefs..."[29]

The Williams Coleman-Henry Amendment, which is the language under challenge, required the N.E.A.

> "to take into consideration general standards of decency and respect for the diverse beliefs and values of the American public".

Some of the comments on why Congress was considering that language came from both sides of the House. Here are some examples:

> Mr. Yates-"All we hear from the other side is two grants: Mapplethorpe, Serrano, Mapplethorpe, Serrano, Mapplethorpe, Serrano."[30]

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[29] 136 Cong. Rec. H9407 (Oct. 11, 1990) (statement of Rep. Pashayan).

[30] 136 Cong. Rec. H9417 (Oct. 11, 1990) (statement of Rep. Yates).

Mr. Rohrbacher- refers to "Our money going to attack Jesus Christ and submerging Jesus Christ in a bottle of urine or to portray Jesus Christ as a heroine addict."[31]

Mr. Helms said,
"Well, what did we get from the N.E.A.'s experts...They gave us Andres Serrano blasphemous works and Robert Mapplethorpe's repulsive photos."[32]

Mr. Helms- mentions on page S18002:
"I will never forget that occasion to express our outrage that the National Endowment for the Arts had subsidized an artist who put a crucifix in a vat of his own urine, taken a picture of it, and gave it a mocking degrading title. He went out of his way to insult the Christian community...taxpayers were forced to help honor...this so called art, denigrating our Lord, Jesus Christ."[33]

Mr. Hyde in supporting the Regula Amendment (not adopted) refers to the Mapplethorpe and Serrano photos.[34]

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31 136 Cong. Rec. H9418 (Oct. 11, 1990) (statement of Rep. Rohrbacher).

32 136 Cong. Rec. S17990 (Oct. 24, 1990) (statement of Sen. Helms).

33 136 Cong. Rec. S18002-3 (Oct. 24, 1990) (statement of Sen. Helms).

34 136 Cong. Rec. H9682 (Oct. 15, 1990) (statement of Rep. Hyde).

In the Senate debate, Mr. Wirth noted,
"Last year in reaction to the support to the works of Andres Serrano, and Robert Mapplethorpe, Congress cut the appropriation for the N.E.A. by $45,000 . . ."[35]

Mr. Chaffee,
"Last year the N.E.A. came under internal Congressional scrutiny for having indirectly supported certain distasteful exhibits by two artists, Robert Mapplethorpe and Andres Serrano."[36]

Mr. Helms-(in reference to the Hatch Amendment)-
"The pending amendment is nothing but another attempt by the supporters for the Arts and specifically Mapplethorpe, Serrano, and all the rest to perpetuate a snow job." (136 Cong. Rec. S17990).

Mr. Roth adds his concept of the language-
"What we are proposing is preventing the National Endowment for the Arts from using tax dollars to fund...works denigrating religious beliefs or an individual's race or sex and attacks desecrating the U.S. flag."[37]

Mr. Dornan (on explaining his vote on the Crane Amendment to abolish the N.E.A.) states:

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35 136 Cong. Rec. S16635 (Oct. 24, 1990) (statement of Sen. Wirth).

36 136 Cong. Rec. S17981 (Oct. 24, 1990) (statement of Sen. Chaffee).

37 136 Cong. Rec. H9422 (Oct. 11, 1990) (statement of Rep. Roth).

> "If the arts community has said 'Serrano's blasphemy against the crucified Christ and Mapplethorpe's homoerotic photographs...are garbage which should never have been funded' then I am sure we would not be going through this exercise...Serrano's loathsome pictures of Christ was both blasphemous and bigoted."[38]

It is the contention of Amicus that viewed in light of the primary concern of Congress to prevent Serrano type excesses that the phrase under consideration can be interpreted as a concern for blasphemy and therefore the phrase "consider...diverse beliefs and values of the American public" can be authoritatively construed and conflated into the phrase "whether or not blasphemous." Blasphemy, of course, is a common law crime.

In the alternative, this Court could rule that the authority in the statute for the Chairperson to make rules and regulations clarifying this term (as the FCC did with the term indecent) warrants a refusal to strike down this statute on the ground of vagueness until such time as the Chairperson can interpret this language. In other words, it was premature for the Ninth Circuit to act until such interpretation has been made and tested.

IV. At All Events the Phrase "Respect for the Diverse Beliefs and Values of the American Public" Can Be Severed.

If the statutory language above is believed to be incurably overly broad, this Honorable Court can save the

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[38] 136 Cong. Rec. H9439 (Oct. 11, 1990) (statement of Rep. Dornan).

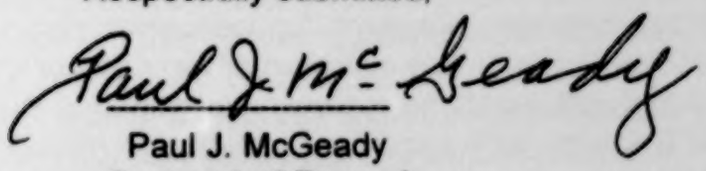
balance of the language of 954(d)(1) simply by severing this believed to be vague language. Such action is proper if the balance of such statutory language can stand on its own and this Court believes that Congress would still have enacted the statute without the offending language.

Now it is apparent "taking into consideration general standards of decency" can stand on its own and needs no underpinning from the balance form 954(d)(1). It is obvious too that the debates and the language of the statute reflected these alternate concerns for indecency and blasphemy. It comes down to the question of whether or not Congress would still want the statutory language if it required the N.E.A. to still consider indecency (embodied in the Mapplethorpe example and others) but lost the requirement relative to respect for the diverse beliefs and values of the American people. It is Amicus's contention and belief that yes! Congress would still want to preserve the considerations of "General Standards of Decency" as indicated by the language and emotions vented in the debates and on the theory that a half-a-loaf is better than none.

CONCLUSION

For all the above, Amicus urges that the statute be sustained as is, or that it be authoritatively construed to sustain its constitutionality, or if the phrase "respect for the diverse beliefs and values of the American public" is believed to be unconstitutionally vague, that phrase be severed and the balance of the statute saved.

Respectfully submitted,



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No. 97-371

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

NATIONAL ENDOWMENT FOR THE ARTS
Petitioner,

v.

KAREN FINLEY, JOHN SLECK, HOLLY HUGHES, TIM MILLER, NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATION
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE UNITED STATES

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CONSENT OF PARTIES

Attorneys for Petitioner and Respondents have consented to the filing of an amicus curiae brief by National Family Legal Foundation. (Appendix A).

INTEREST OF THE AMICUS CURIAE

National Family Legal Foundation is a nonprofit, public interest corporation that seeks to preserve the integrity and the innocence of children by promoting a healthy and safe environment, free from pornography and the sexual crimes which invariably accompany its widespread availability. NFLF provides legal assistance to

individuals, organizations, prosecutors and other public officials concerned about the harmful impact of pornography on the quality of life.

NFLF's first executive director, Alan E. Sears, was the Executive Director of the Attorney General's Commission on Pornography. In its 1986 Final Report, the Commission discussed the harms caused by the proliferation of sexual images in our society and warned against the dangers of exposing children and unconsenting adults to pornography. Former Attorney General Edwin Meese III, who presented the 1986 Commission report, continues to support enforcing constitutional laws restricting various forms of pornography by serving as an active member of the Board of Directors for amicus National Family Legal Foundation.

NFLF believes that even non-obscene pornographic images have a negative impact on society, and that taxpayer money should not pay for such indecent material or performances. Further, NFLF believes "indecent" speech has lower constitutional protection than other types of speech, and a

limit on taxpayer funding of indecent performances or material is a legitimate and constitutional governmental regulation. NFLF represented these views in an amicus curiae brief accepted and considered by the United States Court of Appeals for the Ninth Circuit in this case.

SUMMARY OF THE ARGUMENT

The Ninth Circuit decision to invalidate the decency provision of 20 U.S.C. 954(d) (1990)[1] paints First Amendment law with a very broad brush, indeed. *Finley v. National Endowment for the Arts*, 100 F.3d 671 (9th Cir. 1996), *reh. den.* No. 92560280 (9th Cir. May 1, 1997). Ignoring the finer details of the law and pontificating on the dangers of content-based legislation, the court entirely fails to establish that any speech is actually being suppressed by the decency provision. Suppression is the touchstone of a First Amendment claim.[2] It simply does not exist in this case.

The Ninth Circuit's tortuous attempt to find a valid First Amendment liberty interest on which to base a vagueness claim is a thinly veiled attack on morality-based

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[1] "No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that-

(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . . ." 20 U.S.C. 954(d).

legislation. The court holds that the decency clause is vague, and at the same time ignores the glaringly obvious vagueness of the rest of the statutory scheme.[3] What drives the decision is not legal scholarship, but opposition to religion and morality in the public sphere. The Ninth Circuit has converted the First Amendment from its original purpose of providing a shield to protect the individual from state oppression into a sword used to remove morality from democratically enacted legislation.

This Court has long recognized the legitimacy of the governmental interest in protecting public morals. The protection of societal order and morality justifies the suppression of obscenity. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973). The state interest in protecting public morality is a valid basis for time, place

[2] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. Amend. I (emphasis added).

[3] Of course the statutory criteria are vague. . . . 'Artistic excellence' and 'artistic merit' are also vague, and could not be proper criteria for censorship or discrimination in an entitlement program." *Finley*, 100 F.3d at 688 (Kleinfeld, J., dissenting).

and manner regulations on speech. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion); *California v. LaRue*, 409 U.S. 109 (1972); *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996); *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978). Furthermore, since indecent and offensive speech does little to further the exalted political and social purposes of the First Amendment, it should be afforded less protection than other forms of speech. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50. (1976); *Renton, supra; 44 Liquormart, supra.* Because the American people, through their elected representatives, are entitled to define the limits of a program for which taxpayer funds have been appropriated, *Rust v. Sullivan*, 500 U.S. 173 (1991), there is no constitutional infirmity in refusing to pay for art that may contribute to the moral decline in America.[4]

[4] We assume for the purpose of our argument, without conceding the point, that the decency provision prohibits the funding of art that offends the standards of decency of a majority of the American public.

ARGUMENT

I. THE GOVERNMENT'S SUBSTANTIAL INTEREST IN THE PRESERVATION OF SOCIETY'S MORALS IS ADEQUATE TO SUPPORT THE DECENCY PROVISION

A. Since the decency clause does not impose an unconstitutional condition on the receipt of a government benefit and since government funding of the arts is not a public forum, the decency clause does not violate the First Amendment.

The First Amendment is violated when the government "abridges" freedom of speech. There are many contexts in which the government can suppress speech without imposing an outright ban. In the area of funding, the general rule is that "[W]hen the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194 (upholding government regulations limiting the ability of Tile X fund recipients to engage in abortion-related activity or to endorse abortion as a means of birth control); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983)

(upholding tax exemption for nonprofit entities that do not engage in lobbying).

There are two exceptions to this rule. The First Amendment is violated when government places an unconstitutional condition on the receipt of a government benefit. *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364 (1984) (invalidating a federal law providing that noncommercial television and radio stations that receive federal grants may not engage in editorializing, even if the editorializing is funded by private monies). An unconstitutional condition does not exist if the recipient is free to engage in protected activity outside the scope of the government program. See *Rust*, 500 U.S. at 196-99. Since artists are free to create indecent art with private funds, no unconstitutional condition exists and

the artists' free speech has not been abridged.[5]

A second exception to the general rule that government can define the limits of its programs is when a limited public forum is created by the funding. A limited public forum exists when the government makes money generally available to encourage a diversity of views from private speakers. See *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S.Ct. 2510 (1995) (invalidating university regulation which paid expenses for virtually all student groups except those with a religious viewpoint). Because the National Endowment for the Arts ("NEA") does not give money to all artists who apply, but rather subsidizes select artists to speak certain messages, a limited public forum

[5] The Ninth Circuit's assertion that *Rust* and *Regan* are inapplicable because they did not involve vagueness challenges is a *non sequitur*. *Finley*, 100 F.3d at 679, n. 17. Where, as in this case, there is no possibility of chilling First Amendment speech and the only potential danger is the loss of a prize, a vagueness challenge, whether grounded in the First or Fifth Amendments, is inapposite.

does not exist.[6] Therefore, the general rule for funding of speech applies. Congress can make the value judgment that indecent and offensive art is of slight benefit to society and may even be harmful, and can place indecent art outside the scope of the NEA funding program. If the government can prohibit indecent speech in certain contexts, see *Pacifica*, it certainly can refuse to pay for it.

B. The preservation of morals has long been considered to be within the legislative power of government and is a substantial basis on which to deny an NEA grant.

Since the decency clause does not suppress indecent art, one can only conclude that the Ninth Circuit's opinion is based, not on a concern for liberty, but on animus toward moral judgments in legislation.[7] However, this Court has

[6] The various content-based distinctions in 20 U.S.C. § 954(c) and (d) indicate Congress intended to use artists to convey certain messages rather than pay artists to say what they wanted.

[7] "Thus, we routinely consider whether speech-related statutes are impermissibly vague without specifying the liberty or property interest at stake." *Finley*, 100 F.3d at 675, n.4.

never held that moral distinctions in legislation are oppressive *per se*, whether or not the effect of the legislation is to restrict individual liberty. And this Court has never considered moral judgments in law to be incompatible with a free society. In fact, this Court has long recognized the government's substantial interest in promoting morality and on this basis has upheld many speech-related restrictions ranging from total suppression to time, place and manner regulation on this basis.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court upheld a state law prohibiting the uttering of "offensive, derisive or annoying word[s]" to anyone "with intent to deride, offend or annoy him". *Chaplinsky*, 315 U.S. at 569. In so doing, the Court stated, "it has been well observed that such utterances [lewd, obscene, profane, libelous, insulting speech] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth than any benefit that may be derived from them is clearly outweighed by the social interest in order and

morality." *Chaplinsky*, 315 U.S. at 572 (emphasis added). The Court reasoned that society's interest in order and morality was a sufficient basis for upholding a statute that suppressed speech which was likely to result in a breach of the peace.

Following the reasoning of *Chaplinsky*, the Court in *Roth v. United States*, 354 U.S. 476 (1957), held that obscenity is not constitutionally protected speech:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . 'The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of thoughts between subjects . . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained . . . . This is the same judgment expressed by this court in *Chaplinsky v. New Hampshire* . . . ."

Roth, 354 U.S. at 484-85 (emphasis added).

This same reliance on a concern for public morality formed the basis for the obscenity tests enunciated in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) and *Miller v. California*, 413 U.S. 15 (1973). The second prong of the *Memoirs* test required that the material in question be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *Memoirs*, 383 U.S. 418 (emphasis added). Similarly, the first two prongs of the *Miller* test – whether the average person would find that the work appeals to the prurient interest in sex and whether the work depicts or describes sexual conduct in a patently offensive way – are determined with reference to contemporary community standards. *Miller*, 413 U.S. at 14; *Smith v. United States*, 431 U.S. 291 (1977). Therefore, unlike the Ninth Circuit, the Supreme Court has never held that morality concerns cannot be used to justify restrictions on speech. In fact, a concern for the preservation of morality forms the basis for suppressing obscene speech.

Nor can it be claimed that the preservation of morality is an impermissible basis for any lesser restriction on speech that is protected by the First Amendment. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), this Court upheld a state indecency statute which placed an incidental limitation on the purportedly expressive activity of nude dancing. "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." *Barnes*, 501 U.S., at 569 (plurality opinion). "Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered . . . immoral. . . . [T]he Constitution does not prohibit [certain types of legislation] simply because they regulate 'morality'". *Barnes*, 501 U.S. at 575 (Opinion of Scalia, J., concurring).

In *California v. LaRue*, 409 U.S. 109 (1972), this Court upheld California Department of Alcoholic Beverages Control regulations which prohibited nudity and the performance of sex acts in establishments licensed to sell

liquor, while noting that some of the activities proscribed were protected by the First Amendment. *LaRue*, 409 U.S. at 118-19. The Court acknowledged that police power to protect the public health, welfare and morals, but based its decision instead on the Twenty-first Amendment. *LaRue*, 409 U.S. at 114.

In *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996), this Court affirmed the holding of *LaRue*, but disavowed its reliance on the Twenty-first Amendment, relying instead on the state's police power to regulate expressive conduct: "[T]he Court has recognized that the State's inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *44 Liquormart*, 116 S.Ct. at 1514.

Finally in *Federal Communications Commission v. Pacifica Foundation, supra*, this Court upheld the FCC's authority to impose sanctions on licensees who engage in indecent broadcasting. In so doing, three of the Justices

reasoned that "These words offend for the same reasons that obscenity offends. . . . '[A]ny benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Pacifica*, 438 U.S. at 746 (quoting *Chaplinsky, supra*). Regardless of whether it is appropriate to apply the definition of "indecency" articulated in *Pacifica* to the arts,[8] this Court recognized the government's concern for morality and upheld the FCC's power to impose sanctions on speakers who violated its decency standard.

While the Ninth Circuit opinion implicitly holds that the concern for public morality and speech-related legislation are mutually exclusive under the First Amendment, the previous cases clearly indicate that a concern for the preservation of public morality is not inconsistent with free speech rights and, indeed, is one of

[8] See *Finley*, 100 F.3d at 679, n. 15.

the purposes of the First Amendment. See *Roth*, 354 U.S. at 484-85. Contrary to the Ninth Circuit's thinking, the true inconsistency lies in a view of the First Amendment which would permit the suppression and regulation of offensive speech in order to uphold morality, while disallowing a legislative decision to refuse to promote speech that "offend[s] for the same reasons that obscenity offends." *Pacifica*, 438 U.S. at 746. Consistent with this Court's treatment of indecent and offensive speech and its recognition of the government's concern for public morality, this Court should uphold the decency clause in §954(d) as a valid method of keeping government out of the business of promoting immorality.

C. Morality is the bedrock on which a free society maintains its existence.

A present-day concern for public morality is not merely a quaint relic reminding us of a more homogeneous religious past. The Founding Fathers considered morality to be integral to a free and healthy society. George Washington in his

farewell address stated: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."[9] John Adams stated in his speech "Thoughts on Government":

> The dignity and stability of government in all its branches, the morals of the people . . . depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive . . . . A constitution founded on these principles . . . causes . . . good morals to be general.

Unfortunately, many in America have relegated to folklore the notion that morality is necessary or even possible in modern society. But the legacy of immorality has produced devastation in our country. According to the Centers for Disease Control, approximately 70 percent of AIDS cases diagnosed through 1996 are attributable to unprotected sexual activity and intravenous drug use.[10] As of 1995, HIV

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[9] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (Published by Authority of Congress, 1899), Vol. 1, p. 220.

[10] Centers for Disease Control and Prevention ("CDC"), *HIV/AIDS Surveillance Report-1996*, Vol. 8 No. 1 June 1996, Table 3, p. 8.

infection was the leading cause of death for males 25-44 years of age.[11]

Moreover, in 1992, approximately 30 percent of 14- and 15- year-old teenagers were sexually active, and almost 20 percent had multiple sex partners. Almost 60 percent of 16- and 17- year-olds were sexually active and almost 40 percent had multiple partners.[12] When one considers the increased levels of sexual activity among young people with the devastation of AIDS and other sexually transmitted diseases, the specter of potential harm is truly frightening.

Not only has the lowering of moral standards resulted in disease and death, but it has locked many into a life of poverty, abuse and behavioral problems. The number of births to unwed mothers under the age of 19 increased from approximately 275,000 in 1985 to approximately 375,000 in 1991; the number of births in the 20-29 age group rose from

[11] CDC, "Report of Final Morality Statistics, 1995", *Monthly Vital Statistics Report*, Vol. 45, No. 11 (S2).

450,000 in 1985 to over 650,000 in 1991.[13] The difficulty of raising children alone has resulted in a disproportionate amount of social problems being associated with single parenting.

According to a growing body of social-scientific evidence, children in families disrupted by divorce and out-of-wedlock birth do worse than children in intact families on several measures of well-being. Children in single-parent families are six times as likely to be poor. They are also likely to stay poor longer. Twenty-two percent of children in one-parent families will experience poverty during childhood for seven years or more, as compared with only 2 percent of children in two-parent families. A 1988 survey by the National Center for Health Statistics found that children in single-parent families are two to three times as likely as children in two-

[12] Adams P.F., Schoenborn C.A., Moss A.J., Warren C.W., Kann L., *Health Risk Behaviors Among Our Nation's Youth*, National Center for Health Statistics. Vital Health Stat 10(192) 1992.
[13] Ventura, S.J., *Births to Unmarried Mothers: United States, 1980-1992.* National Center for Health Statistics Vital Health Stat 21(53) 1995.

parent families to have emotional and behavioral problems. They are also more likely to drop out of high school, to get pregnant as teenagers, to abuse drugs, and to be in trouble with the law. Compared with children in intact families, children from disrupted families are at a much higher risk for physical or sexual abuse.[14]

As these facts indicate, morality is not merely an esoteric notion for philosophers to discuss at their leisure, but rather it has a real impact on the quality of people's lives . . . and deaths. Artists who view themselves as self-appointed prophets of a new morality are not the ones cleaning up the mess created by their libertine philosophies. If mainstream Americans protest the spending of public money on art that challenges conventional mores, it is because those same Americans and their children are paying and will continue to pay the long-term costs. If the right of self-determination

[14] Barbara Dafoe Whitehead, "Dan Quayle Was Right", in *Atlantic Monthly*, April 1993.

does not include the right to refuse to allocate money to support speech reasonably associated with suffering and untimely deaths, then such a right is not very significant.

II. INDECENCY HAS LESS FIRST AMENDMENT VALUE THAN POLITICAL AND SOCIAL SPEECH AND THEREFORE IS SUBJECT TO DIFFERENT TREATMENT IN CERTAIN CONTEXTS.

Because indecency "offend[s] for the same reasons that obscenity offends"[15] it should be accorded less constitutional protection than political or social speech.

In *Pacifica*, a plurality of this Court stated with reference to indecent speech:

> T]he constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is characteristic of speech such as this that both its capacity to offend and its "social value" . . . vary with the circumstances.

Id., at 747.

[15] *Pacifica*, 438 U.S. at 746.

In that case, the Supreme Court ruled the FCC could regulate the time when "obscene, indecent, or profane language" was broadcast, pursuant to 18 U.S.C. § 1464:

> If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content – or even to the fact that it satirized contemporary attitudes about four-letter words – First Amendment protection might be required. But that is simply not the case. These words offend for the same reasons that obscenity offends.

Pacifica, at 746.

The monologue in question, though not legally obscene, used a variety of words describing excretory and sexual organs and activities, the exposure of which by verbal or physical acts the Court considered "offensive irrespective of any message that may accompany the exposure." *Pacifica*, at 746, n. 23 (emphasis added). Some of the artists' work in this case is characterized by similarly offensive speech or conduct. The fact that indecency may be classified as art does not save it from being categorized as low-level speech, just as

the possible political or satirical nature of the Carlin monologue did not afford it full First Amendment protection, the possible artistic nature of the material in *Young* did not exempt it from time, place and manner regulation, and labeling the conduct in *Barnes* as "dance" did not protect it from a state's prohibition of public nudity. That which the government can entirely prohibit in certain contexts, it must not be required to pay for.

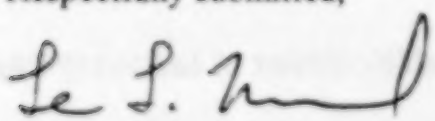
CONCLUSION

In summary, the First Amendment does not condemn American people to the unenviable position of endorsing what they cannot tolerate, for any art funded by the NEA necessarily bears the imprimatur of the American public. Principles of self-autonomy and of democratic government trump any imagined liberty interest at stake. The artists are not stripped of their freedom to create offensive art by the decency clause. The American people are entitled to exercise their freedom to use public funds in a manner consistent with

their standards and values. To those who smear chocolate on their private parts in public, the American taxpayer is entitled to say, "Don't quit your day job, because we're not paying for this anymore."

For all the foregoing reasons, amicus curiae National Family Legal Foundation respectfully requests that this court reverse the decision of the U.S. Court of Appeals for the Ninth Circuit, and uphold the constitutionality of the decency provision of 20 U.S.C. § 954(d).

Respectfully submitted,



Len L. Munsil
Counsel of Record for amicus curiae

Sheila Green

APPENDIX A

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

RECEIVED
JAN 2 1998

December 29, 1997

Sheila A. Green
Associate Legal Counsel
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11000 North Scottsdale Road
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Re: National Endowment for the Arts v. Finley, No. 97-371

Dear Ms. Green:

As requested in your letter of December 23, 1997, I hereby consent to the filing of an amicus curiae brief by the National Family Legal Foundation in the above-captioned case.

Sincerely,

Seth P. Waxman

Seth P. Waxman
Solicitor General

cc: William K. Suter, Esq.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

I HEREBY CONSENT to the filing of an amicus curiae brief by National Family Legal Foundation in support of the position of the appellant in the case National Endowment for the Arts v. Finley, Docket No. 97-371

DATE 12/29/97 _____
Attorney of Record for Appellee
Respondents: Karen Finley, et al.

TOTAL P.002

BEST AVAILABLE COPY

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amicus Curiae National Family Legal Foundation In Support of the United States" have been sent by Federal Express for overnight delivery prior to 3:00 p.m. on Friday, January 9, on this 8th day of January, 1998 to the following:

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Len L. Munsil

Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

No. 97-0371

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,
Petitioners

v.

KAREN FINLEY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING PETITIONERS

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NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING PETITIONERS

INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is a nonprofit, public interest law firm and educational organization dedicated to protecting religious liberty, human life, and the family. ACLJ attorneys have argued or participated as amicus

*. Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

curiae in numerous cases in this Court. See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *United States v. Kokinda*, 497 U.S. 720 (1990); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

The ACLJ, because of its commitment to defending the family, opposes the expenditure of federal funds for arts programs in circumstances in which the financial means to provide such aid is a reliance on taxation of individuals and families. Consequently, the ACLJ is generally not in favor of the program of grants and aid administered by the National Endowment for the Arts. Confronted by the *de facto* existence of such continuing programs of federal financing of art, the ACLJ views the restrictions on arts funding that are at issue here — limiting funding to arts grantees whose projects satisfy the requirements of excellence and merit, taking into consideration decency and respect for the diversity of American beliefs and values — appropriate and constitutionally permissible. Thus, the ACLJ urges the Court to reverse the erroneous decision of the United States Court of Appeals for the Ninth Circuit below.

SUMMARY OF ARGUMENT

While every American remains free, under the First Amendment right of free speech, to express their beliefs, opinions and values indecently and without respect, the decision below erroneously concludes that a federal program of funding for arts violates the United States Constitution.

First, Congress quite properly may choose to create a program and to allocate funds for it even though the program

advances a particular message or viewpoint. For example, it is long settled that childbirth may be preferred over abortion in government programs. Moreover, as *Rust v. Sullivan*, 500 U.S. 173 (1991) demonstrated, the government may condition the receipt of a grant of federal funds within a federal program on certified compliance with the purposes, goals and restrictions of the federal program.

Second, the decision below erroneously concludes that this Court's opinion in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995) supplanted the principles noted and followed in *Rust*. Treating the policy choice to create a vital student speech forum on a public campus as identical to the policy choice to create a limited and discrete program of federal assistance to groups and individuals accomplishing the purposes of a federal program shows the ineptitude of the court below in analyzing the matter before it.

Third, the statutory terms at issue, "decency" and "respect," are amenable to ready definition. These are terms of ordinary meaning readily grasped by men of common intelligence. Consequently, the use of these terms in describing the considerations to be brought to bear by the NEA in considering applications for funding does not raise any serious problem of vagueness.

Fourth, Congress is free to condition receipt of NEA grants on the content of a piece of art. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n. 6 (1992). Moreover, the condition at issue here — that the NEA not fund art works that do not reflect "general standards of decency and respect for the diverse

beliefs and values of the American public"[1] — does not violate the First Amendment's prohibition against viewpoint discrimination. The NEA is by no means a censor; artists are free to produce whatever works they desire. But the NEA is in effect a "purchaser" of art or a prize giver; like any other purchaser or prize giver, the NEA has the right to pay only for art that reflects its own tastes and viewpoints or award prizes only to works that reflect the qualities the NEA thinks are important enough to reward. Moreover, a condition that art be decent and respectful is not viewpoint discrimination in any event.

---

1. This paraphrase of the statute assumes that the Ninth Circuit correctly construed the "decency and respect" provision to state a controlling criterion for art funding, that is, that the NEA must consider decency and respect for each grant application and may not fund indecent or disrespectful art. We believe that Judge Kleinfeld has demonstrated that this may well not be a proper interpretation of the provision. *See* 100 F.3d at 688-89. However, the decency and respect provision does not violate the First Amendment even if the Ninth Circuit's interpretation of that provision is correct.

ARGUMENT

I. NO CONSTITUTIONAL VIOLATION RESULTS FROM A PROGRAM OF GOVERNMENT FUNDING, BY LIMITING SUCH FUNDING TO ACTIVITIES BASED ON "ARTISTIC MERIT" AND "GENERAL STANDARDS OF DECENCY AND RESPECT FOR THE DIVERSE BELIEFS AND VALUES OF THE AMERICAN PUBLIC"

A. The Grants Program of the National Endowment for the Arts Is Not Subject to Analysis under this Court's Public Forum Doctrine

In 1965, Congress established a federal arts program, the National Endowment for the Arts. See National Foundation on the Arts and Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 845, 20 U.S.C. 951 *et seq.* (the "NFAHA"). In crafting this program of public art, Congress found that, although "[t]he encouragement and support of national progress and scholarship in the . . . arts" is "primarily a matter for private and local initiative," these objects "are also appropriate matters of concern to the Federal Government." 20 U.S.C. 951(2).

In 1990, Congress amended the NFAHA, providing explicitly, for the first time, for consideration of certain factors in analyzing applications for federal funding. Pub. L. No. 101-512, 104 Stat. 1960. In particular, the 1990 amendments prohibit the Chairman of the NEA from making any payment under the federal arts program absent consideration of "artistic excellence and artistic merit" "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . . ." 20 U.S.C. 954(d).

The need for these amendments was illustrated by public

disclosure of certain federal arts funding decisions. Among the funded activities that inflicted offense and degradation on beliefs and values held by many Americans were two momentously controversial arts exhibits: a retrospective on the career of graphic, frequently obscene and persistently crude photographer Robert Mapplethorpe; and, an exhibit of the viciously offensive photograph, "Piss Christ", depicting a Roman Catholic crucifix immersed in a container of the artist's urine. See 135 Cong. Rec. 9788-89, 10,323-25, 14,431-33 (1989). Accordingly, Congress the NEA Chairman to employ the factors noted above in determining grant applications.

The litigation now before this Court arose after the individual respondents were denied federal arts funding as Congress considered its 1990 amendments to the National Fine Arts and Humanities Act. Pet. App. 49a. After this suit ensued, the 1990 amendments were enacted, and the respondents amended their complaint to challenge the amendatory provisions of the Arts, Humanities, and Museums Amendments of 1990. Pub. L. No. 101-512, 104 Stat. 1960. Contrary to the conclusions reached in the courts below, amicus curiae ACLJ believes that the enacted amendments are consistent with the Constitution, as is made obvious when this government funding program is compared with others.

This Court consistently has rejected the notion that government refusal to subsidize expression of First Amendment rights constitutes a suppression of those rights. See *Rust v. Sullivan*, 500 U.S. 173, 192 (1991); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1988). In *Regan*, the Court held that Internal Revenue Code provisions granting a tax deduction to veterans groups that conduct lobbying activities, but not to other charitable

groups engaged in lobbying, did not violate the First Amendment. 461 U.S. at 551. The Court framed the issue as "not whether TWR must be permitted to lobby but whether Congress is required to provide it with public money with which to lobby." *Id.* The Court answered that TWR was not entitled to public monies to pursue its free speech rights, explaining that "although government may not place obstacles in the path of a person's exercise of freedom of speech, it need not remove those obstacles not of its own creation." *Id.* at 549-50 (citations omitted).

The nature of the federal arts program is such that it is not a fit subject for analysis under this Court's public forum doctrine. Rather, the grants and aid program administered by the NEA is akin to, and its restrictions in funding are as sustainable, as the Title X regulations restricting abortion advocacy by recipients of Title X family planning funds. This Court subsequently applied its holding in *Regan* to a case involving government-funded speech. In *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court rejected First Amendment free speech challenges to a restriction within the federal Title X family planning program. There, this Court considered regulations promulgated by the Secretary of Health and Human Services (the Secretary) in 1988 that were intended to clarify certain issues that had arisen in the administration of Title X programs. This Court noted, "the regulations attach[ed] three principal conditions on the grant of federal funds for Title X projects":

> First, the regulations specif[ied] that a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family

planning." . . . Second, the regulations broadly prohibit[ed] a Title X project from engaging in activities that "encourage, promote or advocate abortion as a method of family planning." . . . Forbidden activities include[d] lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities. . . . Third, the regulations require[d] that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities. . . . To be deemed physically and financially separate, "a Title X project must have [had] an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies [was] not sufficient."

Rust, 500 U.S. at 179-80 (citations omitted). Title X funding recipients challenged these limitations on the use of Title X funding, asserting that "the regulations violate the First Amendment by impermissibly discriminating based on viewpoint . . . ." *Rust*, 500 U.S. at 192.

But the funding recipients in *Rust* had no well-made argument that the First Amendment barred Congress from drawing the parameters of a program of funding of family planning activities. This Court took note, in the first instance, that Congress was well within its sphere of authority to prefer

childbirth over abortion. *Rust*, 500 U.S. at 192. This Court rejected the argument that a government-funded program providing family planning services violated the First Amendment because it disallowed participants from engaging in abortion counseling or referrals. When the "government appropriates public funds to establish a program, it is entitled to define the limits of that program." 500 U.S. at 194.

Thus, as this Court noted in *Rust*, Congress is entitled to award grants using criteria that are based on the content of speech and may do so without any violation of the First Amendment right of free speech. Otherwise,

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numberous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . , it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.

Rust, 500 U.S. at 194 (citation omitted). There remained no doubt after *Rust* that "the Government [might] choose[] to subsidize one protected right" without being obliged to "subsidize analogous counterpart rights."[2] And, this Court

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2. In reaching this conclusion in *Rust*, this Court relied on earlier holdings in *Regan v. Taxation with Representation*, 461

reaffirmed, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 500 U.S. at 192-193 (citing *Maher v. Roe,* 432 U.S. 464, 475 (1977)).

Thus, as directly suggested in *Rust*, the federal government may choose to fund arts activities that it has determined warrant support and may do so while applying artistic criteria. Nothing more than that which *Rust* allowed did Congress do. Congress simply mandated that the NEA Chairman take appropriate steps to insure that the NEA rules and regulations take into account "artistic excellence and artistic merit," as well as "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. 954(D)(1).

The NEA is not subsidizing artists or art generally; it is merely giving grants to a select few particularly worthy artistic projects. In giving grants, the NEA is using public money to provide art for the public and, in effect, purchasing art for public dissemination. Like any other art purchaser, the NEA is entitled to decide what it wants to purchase, and to insist that it receives what it pays for. This is no different than the situation in *Rust*. There, Congress wanted to provide a specific form of family-planning services--services that did not promote abortion as a means of family planning. Congress purchased these services from private providers. Despite the fact that the funding (purchasing) decision relied expressly on the viewpoint of the provider's speech (anybody who would use funds to counsel or refer for abortions was ineligible for funds), this

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U.S. 540 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); and, *Maher v. Roe*, 432 U.S. 464 (1977).

Court upheld the restriction because Congress was entitled to define the limits of its family-planning program to ensure that it received (and could therefore provide to the public) what it paid for--family-planning services that did not promote abortion. *See Rust*, 111 S.Ct. at 1172-73.

Likewise, Congress is entitled to establish guidelines for NEA grants. *See Rust,* 500 U.S. at 194. In those guidelines, Congress made certain value judgments about what kinds of art it is willing to spend public funds for and enacted criteria, including some based on content and viewpoint, for determining how to spend that money. See 20 U.S.C. § 954(d) (1990) (delineating standards for NEA grants). As Judge Kleinfeld noted in his dissent, the content and viewpoint criteria include not only decency and respect, but also "artistic excellence," promoting cultural diversity, and reflecting the culture of inner cities, rural areas, and tribal communities. The criteria did not include artistic expressions reflecting "cultural homogeneity or white middle class suburban culture." *See* 100 F.3d at 687 (Kleinfeld, J., dissenting). In addition, Congress required the NEA Chairman, when awarding grants, to take into consideration general standards of decency and respect for American values and beliefs. This is not censorship. White middle class artists may still produce and sell white, middle class, culturally homogenous art. Other artists may still produce and sell indecent and disrespectful art. They simply will not receive public monies to do so.

Despite the clear holding of *Rust* and that decision's elucidation of principles controlling here, the United States Court of Appeals for the Ninth Circuit erroneously reasoned that the principles relied on in *Rust*, that affirm the perogative of the federal government to control the content of its own

messages, were altered by this Court's decision in the student speech case, *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995). See *Finley v. National Endowment for the Arts*, 100 F. 3d 671, 681-82 (9th Cir. 1996).

This Court, in *Rosenberger*, concluded that a state university violated the First Amendment when it refused to provide funding for a Christian student group's publication, in circumstances where funding was provided to other religious student groups. *Rosenberger*, 115 S. Ct. at 2520. Unlike the present situation, the facts presented in *Rosenberger* emphatically demonstrated that the state university had created and was facilitating a public forum for student organizations. *Id.*, at 2516-20. In *Rosenberger*, the record evidence was that all student organizations that bore a "relat[ionship] to the education purpose of the University" received student activity fee funds. *Id.*, at 2514. Although eighty-five percent of the applying student groups received funds, the University denied funding to the Christian student group for the single reason that the group's publication promoted a belief in a deity. *Rosenberger*, 115 S.Ct. at 2515, 2517-18.

Nothing in *Rosenberger* invalidates the principles relied on by this Court in *Rust*. Congress remains free to "fund a program [selectively] to encourage certain activities it believes to be in the public interest." *Rust*, 500 U.S. at 193. When Congress created the National Endowment for the Arts in 1965, and as Congress continued to authorize funding for the NEA, the purpose of Congress was not the creation of a funding forum. Rather, Congress devised a discriminating program of funding for the purpose of fulfilling the role Congress perceived as appropriate for the federal government with

relationship to the arts. The 1990 amendments — specifying criteria to be considered by the NEA Chairman in developing rules and regulations for the federal arts granting process — simply serve to guarantee that the congressional purpose for the NEA is, in fact, served.

The difference between *Rosenberger* and the present case is stark. Unlike the program in *Rosenberger*, whose purpose was to give funding to support the vast majority of applicants that met minimal qualifications, the NEA exists to award prizes to a very few select artists. In 1994, less than two percent of NEA applicants received those prizes. *See* 100 F.3d at 687. The NEA's primary purpose is not to provide financial support to artists generally but to award prizes to reward and encourage artistic excellence.

This distinction makes all the difference. When a prize giver awards a prize, the prize giver is expressing its view that the recipient reflects the qualities that the prize giver believes are worthy of reward, much as a purchaser buys what he believes best meets his needs or desires. Government's award of a prize is government speech. The NEA grant program is thus analogous to the family planning program in *Rust* (where the government was paying to disseminate the government's message) and not the student funding program in *Rosenberger*.

To hold otherwise would create anomalous results and unduly restrict the government's ability to control public funds used to sponsor or reward artistic achievement. Suppose, for instance, that Congress or a local government offers to fund sculptures depicting "great Americans who have made important contributions to the American way of life." Does the First Amendment prohibit the government from refusing to consider an artist's sculpture of Lee Harvey Oswald on the

grounds that a President's assassin is not a great American or that assassinating a president is not an important contribution to American life? The rejection is certainly based on viewpoint, but it is absurd to suggest the government is suppressing free speech. The sculptor is still free to create and display his sculpture. The government, like any other art purchaser, is simply refusing to buy an artwork it does not want. The NEA funding program constitutes an extended application of the same principle--artists are free to produce indecent or disrespectful art, but Congress simply has stated in advance that the NEA will not purchase or reward art that it considers indecent. Therefore, the NEA funding program does not violate the First Amendment.

B. The Requirement That The NEA "Tak[e] Into Consideration" General Standards of "Decency and Respect" When Awarding Grants for "Artistic Excellence and Artistic Merit" Does Not Trench Upon the First Amendment

1. *The NEA's Grant Program Provides Reasonable and Fair Notice of its Application Process, and is Not "Void for Vagueness"*

As noted above, the NEA's grant program is not amenable to public forum analysis. The NFAHA and its specification that the NEA's regulations governing the grant application process shall ensure that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public," 20 U.S.C. §954(d), is "reasonable" and provides sufficient notice of the

applicable standards for the grant and aid program.[3]

Common sense and the NEA's grant application process require what is obvious and reasonable--when limited grant awards are provided to a select few artists, the NEA will distinguish among the artists based on the content of their art. Indeed, evaluations based on the content of the art is why the NEA grant program exists. The NEA's content-based determinations are made by the 26-member National Council on the Arts, which utilizes advisory panels to review the grant applications and make award recommendations. 20 U.S.C. §959(c). The advisory panels are required to reflect "diverse artistic and cultural points of view" and include "representation of lay individuals who are knowledgeable about the arts." 20 U.S.C. §959(c)(1) and (c)(2). Having these decision-makers take into consideration "decency and respect" as part of the "artistic excellence and merit" review is permissible for two reasons.

First, "decency and respect" are merely among the artistic factors considered. No grant application is automatically disqualified (except obscene work) *or* guaranteed a grant award. Rather, all applications are evaluated based on "artistic" quality. The decision below was correct in *not* being concerned with the vagueness of the "artistic excellence and merit" requirement, and that same lack of concern must govern the inclusion of "decency and respect" as one of many factors to be considered in awarding grants. The First Amendment should not be read to bar government from "taking into consideration"

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3. Reasonable speech restrictions are permissible outside of the public forum context. *Cf.*, *International Society of Krishna Consciousness, Inc. v. Lee*. 505 U.S. 672, 679 (1992).

the aesthetic, taste and similar criteria embodied in notions of "decency and respect" in awarding grants of public funds to support artistic endeavors. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activity it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the [interest] in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Rust*, 500 U.S. 193.

Second, the terms "decency and respect" are not so vague--certainly no more so than "artistic excellence and merit"--as to fail in providing reasonable notice of the kind of art the NEA will fund. In upholding an Illinois' antinoise ordinance challenged as vague and overbroad, this Court's holding in *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972), explained that an ordinance need only provide "fair notice to those to whom [it] applies."[4] Importantly, unlike the situation here, the "particular context" to which the Illinois' antinoise ordinance applied involved traditional public forum--public streets and sidewalks.

Further, the statute and NEA regulations involve a *grant* program to "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States," 20 U.S.C. 953(b), not a criminal statute which would require greater precision to satisfy due process. *Reno v. ACLU*, ___ U.S. ___, 65 USLW 4715 (decided June 26, 1997). *Reno* struck provisions of the Communications Decency Act enacted

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4. Citing *American Communications Association v. Douds*, 339 U.S. 382, 412 (1950).

to protect minors from "indecent" and "patently offensive" communications on the Internet as overbroad and vague. This difference is significant since criminal statutes create an "increased deterrent effect" which when coupled with the "risk of discriminatory enforcement" poses "greater First Amendment concerns than those implicated by [] civil regulation[s]." *Id.* at 4720, citing *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 518 U.S. ___, 116 S. Ct. 2379, 135 L Ed 2d 888 (1996). In *Denver Area* provisions of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §532(h), which permitted cable operators to decide whether or not to carry programs on leased channels it believed were "patently offensive," were upheld as consonant with the First Amendment. Similarly, the NEA's consideration of "decency and respect" in the "particular context" of awarding grants based on "artistic excellence and artistic merit" are consonant with the First Amendment.

Finally, the common meaning of the words "decency" and "respect" provide ample and reasonable notice of what the NEA's grant and aid program may fund. *Webster's New Third International Dictionary* 584 (1993) defines "decency" as:

> 1a: suitability or fitness to circumstances [] b: orderly condition of society; conforming to law [] 2: [] conformity to standards of taste, propriety, or quality [] 3: whatever is proper or becoming : standards of propriety [] 4a: conformity to the standard of living that becomes a person [] 5a: literary decorum or its observance.

The common meaning of "decency" is not mysterious, hidden or unreasonable, and the word provides suitable and reasonable notice as to the type of art the government is willing to consider

funding under the NEA's grant and aid program.[5] Nothing more is required. *Rust*, 500 U.S. at 193.

"Respect" is defined as:

> [] consider, deem, heed, [] 3a: to consider worthy of esteem : regard or treat with respect [] 3b: to refrain from obtruding upon or interfering with [] 4: to have regard or reference to.

Here too the language is entitled to its plain, reasonable meaning, and as applied in the NFAHA and the NEA's grant and aid program is sufficiently clear and reasonable so as to advise what type of art the government will consider funding.

2. The NEA's Grant Program Does Not "Directly Interfere" With Any Protected Expression and to Hold That it Does Makes Other Government Spending Programs Suspect

As noted in *Rust*, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity." *Id.*, 500 U.S. at 193. While the NEA's grant program was designed to foster the humanities and arts, and promote artistic excellence, it does not "directly interfere" with any art form or production. Artists remain unencumbered to pursue whatever artistic expression or form they choose. Likewise, Congress is free to decide to fund or not to fund the art it wishes to foster or develop on behalf of the American public.

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5. Statutory language which is unambiguous is entitled to be construed and applied in accordance with its plain meaning. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) ("[i]n determining the scope of a statute, we look first to its language"); *quoting U.S. v. Turkette*, 452 U.S. 576, 580 (1981), other citations omitted.

The NEA's grant program is not denying a benefit to anyone. As explained in *Rust*, when Congress established a National Endowment for Democracy "to encourage other countries to adopt democratic principles, 22 U.S.C. §4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." *Rust*, 500 U.S. at 194. Indeed, those wishing to promote divergent political philosophies are free to do so. To conclude that the availability of grant and aid programs in one area are unconstitutional because of necessity other programs are not funded would reek havoc on other government programs generally. For example, grant application programs with the National Science Foundation or the National Institute for Health making government funding available for scientific or medical research that improves the public health generally, does not impermissible discriminate against other possible research programs seeking to advance the same goal. Nor does funding on a specific disease like alzheimer's disease, discriminate against other areas of disease research, say AIDS or diabetes. 42 U.S.C. §1871. Nor does an invitation by government for a speaker to address a certain topic impermissible discriminate against any other would-be speaker, regardless of the speaker's viewpoint. Just as the awarding of a scientific grant by the National Aeronautic and Space Administration for research or development is not an impermissible form of discrimination, 42 U.S.C. §2451, et seq., so too the NEA's decision to fund from the public fisc art it judges "excellent" or "meritorious."

As this Court concluded in *Regan*, 461 U.S. at 545, Congress can, consistent with its spending power, reasonably refuse to subsidize one activity while deciding to subsidize others. As noted previously, the issue in *Regan* was the constitutionality of Congress' choice not to subsidize the lobbying activities of charitable organizations exempt from taxation under Internal Revenue Code §501(c)(3), 26 U.S.C.

§501(c)(3), by prohibiting the charity from using tax-deductible contributions to support lobbying activities. Tax-exempt charitable organizations remain free to conduct their nonlobbying activities using tax-deductible contributions, and they are also free to create an affiliate that conducts its lobbying activities. 26 U.S.C. §501(c)(4). Given this alternative, the holding of the *Regan* court also holds here--"Congress has not infringed any First Amendment rights or regulated any First Amendment activity[, it] has simply chosen not to pay for [the] lobbying [of charitable organizations or the artistic endeavors of an artist]." 461 U.S. at 546. To the same effect, those awarded grants under the NEA's application process remain free to independently pursue other artistic expressions that do not use grant monies. The NEA's grant program simply decides to pay for certain art, but not all art. Accordingly, the NEA grant program is consistent with the First Amendment and trenches upon no constitutional rights.

II. BASING ART FUNDING ON STANDARDS OF DECENCY AND RESPECT FOR DIVERSE VALUES DOES NOT DISCRIMINATE ON THE BASIS OF ANY "PROHIBITED PERSPECTIVE" AND THEREFORE DOES NOT CONSTITUTE VIEWPOINT DISCRIMINATION.

Even if Congress were forbidden from making viewpoint-based distinctions in granting special prizes (funding) to a select few artists (or purchasing art for the public), the requirement that no funds be spent for indecent or disrespectful art would not violate the Free Speech Clause because such a requirement does not constitute viewpoint discrimination. Congress has not targeted any particular perspective on subjects Congress is willing to fund. Rather, Congress has restricted the manner in which an artist can address a particular subject or perspective.

Viewpoint discrimination, as this Court's cases have defined it, generally involves singling out speech for disfavor because of "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 115 S.Ct. at 2516. As the First Circuit recently noted, "viewpoint" connotes "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *General Media Communications, Inc. v. Cohen*, 1997 WL 732329, at *7 (2d Cir. Nov. 21, 1997) (quoting *Rosenberger*, 115 S.Ct. at 2517). Thus, for example, the University's decision in *Rosenberger* to refuse to fund discussion of subjects from a religious perspective while funding discussion of the same subjects from other perspectives constituted viewpoint discrimination. *See* 115 S.Ct. at 2517-19. Likewise, the Court found in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393 (1993) that "permitting school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint" constituted viewpoint discrimination.

To find indecency and disrespect to be viewpoints would be "linguistic overreaching." *General Media*, 1997 WL 732329, at *8. Indecency and disrespect are not "standpoint[s] from which a variety of subjects may be discussed and considered" any more than obscenity, nudity, or voice amplification. Rather, indecency and disrespect are much more naturally understood as connoting types of speech or manners of speaking. Like, for instance, nudity or voice amplification, indecency or disrespect might make speech more effective (or at least more emphatic) by emphasizing the speaker's point or making it easier to hear the speaker. But the NEA grant program does not exclude from funding, for example, art that criticizes government policy or promotes eroticism or sexual libertinism. All Congress asks is that the artist not do so in an indecent or disrespectful way--that the art not be gratuitously

insulting, or degrading, or sexually explicit in a way most would find offensive.

Several of this Court's cases support, by analogy, the conclusion that distinctions based on indecency and disrespect do not constitute viewpoint discrimination. *In Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court allowed a school to punish a student for "offensively lewd and indecent speech" because the punishment was "unrelated to any political viewpoint." *Id.* at 685. In *Board of Education v. Pico*, 457 U.S. 853 (1982), a plurality of this Court noted that while a school board could not remove books from a school library to deny students access to disfavored ideas, the board could remove books because they are "pervasively vulgar." *Id.* at 870-71; *see also id.* at 880 (Blackmun, J., concurring) ("First Amendment principles would allow a school board to refuse to make a book available because it contains offensive language"). And in *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992), this Court suggested in dicta that prurience and patent offensiveness are not viewpoints. *See id.* at 388 (while requirement of viewpoint neutrality applies to unprotected as well as protected speech, "[a] state might choose to prohibit only that obscenity which is the most patently offensive in its prurience"). *See also General Media*, 1997 WL 732329, at *8 and n. 12 (holding that distinctions based on "lasciviousness" are not viewpoint-based).

In the NEA grant program, Congress has not singled out any viewpoint, as this Court has defined that term, for disfavored treatment. Therefore, the program does not violate the Free Speech Clause.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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AMICUS CURIAE

BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
Petitioners,

v.

KAREN FINLEY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms. As part of advancing Liberty Counsel's purpose, education is provided through interaction with attorneys and members of the academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amicus curiae* briefs on a variety of issues.

Liberty Counsel is interested in protecting the First Amendment speech\expression rights of individuals. Liberty Counsel is also interested in ensuring that our government utilizes funds in the advancement of our citizen's goals while keeping intact Congressional guidance regarding appropriations for the arts and cultural diversity. Liberty Counsel files this brief in support of the Petitioners with the aim to assist this Court in rendering a reasoned decision regarding the use of taxpayer funds for artistic advancement. Attorney Mathew D. Staver has argued before this Court and herein attempts to lend his assistance in the proper interpretation and application of Congress' approach to grant making through the NEA.

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent of the parties are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. A grant application is pending with the Alliance Defense Fund in Phoenix, Arizona, but no funds have been received.

SUMMARY OF ARGUMENT

On its face, the General Standards for Decency provision does not transgress constitutional tenets. This Court has repeatedly held that facial challenges to legislation are generally disfavored and legislation will generally be upheld. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979), this Court held that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." This precept is based on the fact that a decree to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.).

In light of the substantial burden which must be met by those presenting a facial challenge to Congressional legislation, this Court should defer to the reasonable interpretation advanced by the NEA. As submitted by the NEA, "decency" and "respect . . . are factors only to the extent that they are implicit in the assessment of artistic merit." *Finley v. NEA*, 795 F. Supp. 1457, 1470 (C.D. Cal. 1992). This construction does not violate the Constitution and is, therefore, a possible construction to the provision **on its face**.

The Respondents assert a "property" interest in receiving government subsidies of their artistic expression. This Court has long-recognized the principle that "'the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" *Webster v. Reproductive Health Services*, 492 U.S. 490, 507 (1989) (*quoting DeShaney v. Winnebago County Dept. of Social*

Services, 489 U.S. 189, 196 (1989)). In rejecting any constitutional violation in *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), this Court held that, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."

As clearly enunciated in *Rust*, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. An NEA grant is not an "entitlement" which Respondents may claim a property interest. As noted by this Court in *Rust*, this is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Rust*, 500 U.S. at 194.

ARGUMENT

I.

THE GENERAL STANDARDS FOR DECENCY PROVISION IS NOT FACIALLY UNCONSTITUTIONAL IN LIGHT OF THE HIGHER STANDARD APPLIED TO FACIAL CHALLENGES AND BECAUSE THIS COURT'S PRECEDENT HOLDS THAT TRIBUNALS SHOULD DEFER TO THE NEA'S INTERPRETATION OF THE PROVISION.

A.

In A Facial Challenge, The General Standards For Decency Provision Should Be Construed As Constitutional To Avoid The Constitutional Question.

On its face, the General Standards for Decency provision does not transgress constitutional tenets. Respondents must bear a heavy burden in a facial challenge because "facial challenges to legislation are generally disfavored." *FW/PBS v. City of Dallas*, 493 U.S. 215, 224 (1990). In *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court noted the unique limitations to a facial challenge. This Court held that "we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights." *Id.*, at 183.

> [T]he [Respondents] face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid."

Id. (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The General Standards for Decency provision reads:

> [T]he Chairperson shall ensure that-
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. § 954(d)(1).

In the district court, the NEA advanced two possible constructions which avoid constitutional infirmity:

> (1) that the decency provision does "not impose content restrictions on NEA grant decisions," but "merely implements a method for selecting review panel members" and, alternatively, (2) that "decency" and "respect . . . are factors only to the extent that they are implicit in the assessment of artistic merit."

Finley v. NEA, 795 F. Supp. 1457, 1470 (C.D. Cal. 1992).

On its face, the provision supports a constitutional construction. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979), this Court held that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." Under this canon of statutory construction, "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (*quoting Hooper v. California*, 155 U.S. 648, 657 (1895)).

The axiom articulated in *Hooper* is a categorical one -- "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.).

In the Ninth Circuit, the panel majority gave the provision an implausible construction in order to elevate this issue into a constitutional controversy. The Ninth Circuit held that rather than merely take "decency and respect" into consideration, as the provision reads **on its face**, the NEA is commanded to use "decency and respect" as the conclusive standard for awarding grants. *Finley v. NEA*, 100 F.3d 671, 680 (9th Cir. 1996).

On the contrary, the terms of the provision merely provide criteria for awarding grants. As with any artistic award, some criteria must be established to determine which artist will carry away the prize. For the Academy Awards, the criteria is simply based upon the artistic merit of the production -- thereby reflecting appreciation of the artist's work. In the music industry as well, the criteria is largely based upon sales of the recording -- thereby reflecting the general public's appreciation of the artist's work. The district court held that artistic decisions are by their nature unavoidably subject to aesthetic criteria such as "artistic merit" and "artistic excellence". *Finley*, 795 F. Supp. at 1475.

Central to the decision that one artist wins is the concurrent decision that another artist must lose. Not every film or recording may win "Best Picture" or "Single of the

Year".[2] These decisions must have some criteria. Criteria for artistic expression does not prohibit "taking into consideration general standards of decency and respect" when awarding a prize. As submitted by the NEA, "decency" and "respect . . . are factors only to the extent that they are implicit in the assessment of artistic merit." *Finley*, 795 F. Supp. at 1470. This construction does not violate the Constitution and is, therefore, a possible construction to the provision **on its face**.

This Court has traditionally held that when the validity of an Act of Congress is drawn into question, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). This precept is based on the fact that a decree to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett*, 275 U.S. at 148. As early as 1895 (*Hooper*) and to date, this Court cultivated the corollary doctrine that Congressional statutes "must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *see also United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909). This Court has, by convention and practice, historically assumed that Congress legislates in the light of constitutional limitations. *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-307 (1924).

The uniqueness of a facial challenge to the provision at issue should move this Court to determine the provision is

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[2] Most important, as explained more fully below, artists are not "entitled" to win a grant, just as no artist is "entitled" to an Oscar.

constitutionally sound and, therefore, avoid the question entirely. The lower court's disregard of this Court's long precedent of deferring to the validity of Congressional legislation should not be upheld. This Court should reverse the Ninth Circuit's opinion and find the provision is not, on its face, constitutionally infirm.

B. The General Standards For Decency Provision Should Be Construed As Constitutional Because This Court's Precedent Holds That Tribunals Should Defer To The NEA'S Interpretation Of The Provision.

In *Rust*, this Court reviewed a regulation which authorized the Secretary to make grants pursuant to Title X of the Public Health Service Act ("Act") in the realm of family planning projects. Under the Act, however, "[n]one of the funds appropriated . . . [could] be used in programs where abortion is a method of family planning." *Rust*, 500 U.S. at 178. Like this case, new regulations were later promulgated to provide "operational guidance" on "how to preserve the distinction between Title X programs and abortion as a method of family planning." *Id.*, at 179 (*quoting* 53 Fed.Reg. 2923-2924 (1988)). Like this case, the regulations merely clarified Congress' intent. In *Rust*, the regulations affirmed that the grants should be used "only to support preventive family planning services." *Rust*, 500 U.S. at 179. Much like this case, the *Rust* case presented a facial challenge to the regulations on the grounds that they "violate the First and Fifth Amendment rights of Title X clients and the First Amendment rights of Title X health providers." *Id.*, at 181.

Most important in this case, this Court held in *Rust* that deference must be afforded to agencies when ambiguity is present. In this case, both the district court and court of appeals held the regulation is facially invalid because of vagueness concerns and because it allows an overbroad grant of discretion in interpreting the regulation. In *Rust*, however, this Court held that, "[w]e need not dwell on the plain language of the statute because we agree with every court to have addressed the issue that the language is ambiguous." *Id.*, at 184. Like *Rust*, the lower courts have determined the language at issue is ambiguous (thereby vague) and unconstitutional.

Citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), however, this Court held in *Rust* that under a facial challenge, "substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it." *Chevron*, 467 U.S. at 844. In *Chevron*, this Court stated, "the question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.*, at 842-843. Noting the "broad language" within the Act, this Court rejected the facial challenge in *Rust*, noting that "we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project is impermissible." *Rust*, 500 U.S. at 184.

In the district court, the NEA argued that "decency" and "respect . . . are factors only to the extent that they are implicit in the assessment of artistic merit." *Finley*, 795 F. Supp. at 1470. The district court rejected this interpretation, holding that the NEA's construction was not entitled to deference because it was "manifestly contrary to congressional intent." *Id.*, at 1470 (*quoting Chevron*, 467 U.S. at 844).

The Ninth Circuit contended that:

> And turning to the legislative history, as we do to interpret an ambiguously worded statute, makes it clear that Congress intended to change the standard NEA applied in judging applications for funding, not simply to ask the NEA to consider the problem. NEA had been attacked for funding controversial artists and art works. Criticism had focused on a series of photographs by Robert Mapplethorpe objected to as homoerotic images, and on a photograph by Andres Serrano criticized as blasphemous. The "decency and respect" provision was enacted in direct response to this controversy and was specifically designed to prevent the funding of similar art works. Members of Congress noted that the "decency and respect" provision would prevent the funding of similar works in the future. 136 Cong. Rec. H9410-57 (Oct. 11, 1990).

Finley, 100 F.3d at 676-77 (footnote omitted).

This Court's holding in *Chevron* is enlightening in respect to the Ninth Circuit's assertion that political forces motivated the NEA's (or Congress') revised approach to grant making. In *Chevron*, this Court rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations." *Chevron*, 467 U.S. at 862. An agency is not required to "'establish rules of conduct to last forever,'" *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (*quoting American Trucking Assns., Inc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967);

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990)), but rather "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" *Motor Vehicle Mfrs., supra*, 463 U.S. at 42 (*quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)). In *Rust*, this Court followed its reasoning in *Chevron* by upholding the Secretary's decision, noting that:

> in the wake of the critical reports of the General Accounting Office (GAO) and the Office of the Inspector General (OIG), the prior policy failed to implement properly the statute and that it was necessary to provide "'clear and operational guidance' to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed. Reg. 2923-2924 (1988). He also determined that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against the "elimination of unborn children by abortion." We believe that these justifications are sufficient to support the Secretary's revised approach.

Rust, 500 U.S. at 187.

Noting the unique limitations of a facial challenge, this Court held in *Rust* that great deference must be afforded to the agency charged with administering the program at issue. As held in *Rust*, an agency's interpretation need not be the only possible interpretation, it must simply be one which is not contrary to Congressional intent. "When placed in context . . . the statements fall short of evidencing a congressional

intent that would render the Secretary's interpretation of the statute impermissible. While [Respondents'] interpretation of the legislative history may be a permissible one, it is by no means the only one, and it is certainly not the one found by the Secretary." *Id.*, at 189.

Like *Rust*, the Respondents face a heavy burden in seeking to have the provision invalidated as facially unconstitutional because a facial challenge to a legislative Act is the most difficult challenge to mount successfully. The "challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." *Rust*, 500 U.S. at 183. Like *Rust*, the NEA should be allowed the necessary discretion to administer the grants-in-aid program pursuant to Congress' intent and should be allowed the deference accorded to other federal agencies in interpreting the provision.

II.

THE GENERAL STANDARDS FOR DECENCY PROVISION IS NOT FACIALLY UNCONSTITUTIONAL BECAUSE NO PERSON OR ENTITY MAY CLAIM AN "ENTITLEMENT" TO THE AWARD OF A GRANT.

In this case, the Respondents assert a "property" interest in receiving government subsidies of their artistic expression. In order for an artist to possess a "property" interest in an NEA grant, the artist must first "have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 567 (1972). This Court has long-recognized the principle that "'the Due Process Clauses

generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" *Webster v. Reproductive Health Services*, 492 U.S. 490, 507 (1989) (*quoting DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989)).

"The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected . . . ." *Rust v. Sullivan*, 500 U.S. 173, 182 (1991). This Court has repeatedly instructed that the Constitution is not violated when Congress subsidizes some speech, but not all speech. *Rust*, *supra*; *Regan v. Taxation without Representation of Wash.*, 461 U.S. 540 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976).

In rejecting any constitutional violation in *Rust*, this Court held that, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust*, 500 U.S. at 193. In *Regan*, this Court held that Congress could refuse to subsidize the lobbying activities of certain organizations by prohibiting them from using tax-deductible contributions, holding that such organizations remained free "to receive deductible contributions to support . . . nonlobbying activit[ies]." *Regan*, 461 U.S. at 545. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* at 549. In *Maher*, this Court reviewed a state welfare regulation under which Medicaid recipients received payments for medical services related to childbirth, but not for nontherapeutic abortions. This Court refused the assertion

that such unequal subsidization violated the Constitution, holding that the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474.

In funding one artist and not another, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Rust*, 500 U.S. at 193. *See also Cammarano v. United States*, 358 U.S. 498, 513 (1959). The NEA grant program was conceived to provide grants for works that are "of significant merit" or are "of substantial artistic and cultural significance". 20 U.S.C. § 954(c)(1), (2), (4) - (6). A grant awarded by the NEA is not an "entitlement" that an artist may assert is a vested claim, but is limited to specific criteria and demanding reporting requirements. 20 U.S.C. § 954(h). Merely refusing a grant application does not forbid any conduct or artistic expression. As this Court has held, a "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *McRae*, 448 U.S. at 317, n.19. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher*, 432 U.S. at 475.

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.

Rust, 500 U.S. at 194.

Like the argument rebuffed by this Court in *Rust*, the Respondents' assertions "ultimately boil down to the position that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition." *Id.*, at 194. (*citing Regan*, 461 U.S. 540; *McRae*, 448 U.S. 297; and *Maher*, 432 U.S. 464.). As clearly enunciated in *Rust*, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194.

An NEA grant is not an "entitlement" which Respondents may claim a property interest. On the contrary, the NEA grants-in-aid program merely established limited funding for limited artistic ventures. As noted by this Court in *Rust* and *Regan*, this is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Rust*, 500 U.S. at 194; *Regan*, 461 U.S. at 548.[3] "The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights." *Rust*, 500 U.S. at 198.

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[3] This Court has recognized that Congress' power "to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use." *South Dakota v. Dole*, 483 U.S. 203, 207-209 (1987) (upholding against Tenth Amendment challenge requirement that States raise drinking age as condition to receipt of federal highway funds).

CONCLUSION

For the forgoing reasons, the opinion of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,
Petitioners,

vs.

KAREN FINLEY, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF AMICUS CURIAE FOR THE ROCKEFELLER FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The Rockefeller Foundation ("the Foundation") brings a unique perspective to its role as an *amicus curiae* in this case.[1] The Foundation does not accept funds from the National Endowment for the Arts (NEA). Rather, it is a private charitable organization that, like the NEA, supports the arts by funding artists and arts organizations (often on a co-funding basis with the NEA).

Although the Rockefeller Foundation receives no funding from the NEA, the Foundation has a keen interest in federal arts policy generally, and 47 U.S.C. § 954(d)(1) (the "decency and respect" provision) in particular, because of the effects that provision will have on the development of our culture. For decades, the Foundation has been a leading private supporter of the arts, spending more than $125 million on the arts from 1965 to 1997. The Foundation has contributed to the cultivation of new work in theater, opera, music composition, choreography, and visual arts. The Foundation has also encouraged the creation of newer media directions for artists, such as film and video, alternative art spaces and festivals, and performance art, as well as cross-cultural collaborations and exchanges. In supporting these efforts, the Foundation has always placed special emphasis on supporting meritorious art that is so daring that it may prove too controversial for commercial purposes. The Foundation does so because of its conviction that modern society will be importantly inspired and interpreted through the most advanced ideas of creative individuals -- however unconventional those ideas might be.

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[1]The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amicus* represents that counsel for the parties did not author the brief in whole or in part, and, that no entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

The NEA's enforcement of the "decency and respect" restriction in its own funding decisions will significantly constrain the efforts of the Foundation, others who support the arts, and the overall creative community. That is because combinations of public and private support are the norm for most artistic initiatives, and it is rare for any one funder to provide all the funding necessary for a particular artistic undertaking. Over the past three decades the Foundation and the NEA have collaborated to fund hundreds of projects and initiatives. The Foundation's experience in this regard is typical of the arts funding process generally. Thus, restrictions on the NEA's funding decisions will have wide effects indeed.

The NEA collaborates with private organizations such as the Foundation in three basic ways. First, the Foundation enters into partnerships with the NEA that are jointly designed, managed, and funded by both organizations. Since 1987, for instance, the Foundation has acted together with the NEA, the United States Information Agency, and The Pew Charitable Trusts to create, support and manage the Fund for U.S. Artists at International Festivals and Exhibitions, a partnership established to foster an expanded role for American artists in international festivals and exhibitions. Jointly administered partnerships require exceptionally close cooperation between the NEA and the Foundation, whose officials often meet regularly to set policy for their collective endeavors. Continued NEA participation in these ventures is critical to their survival. For example, the 1994 termination of federal support for the Artists' Projects Regional Initiative (APRI) -- a program created by the NEA and the Rockefeller Foundation, and jointly funded by them along with Andy Warhol Foundation for the Visual Arts -- ultimately led to the demise of the APRI because the NEA previously had provided all necessary administrative infrastructure for the program.

Second, the Foundation collaborates with the NEA on projects that are developed and funded by both organizations but administered through regranting agencies approved by the NEA, the Foundation, and any other funders involved. From 1983 to 1989, for example, the organizations jointly supported OPERA America, a new works program that awarded over 300 grants around the nation to assist in the development of new operas. The Southeastern Center for Contemporary Art (SECCA), a grantee of both the NEA and the Foundation, provided funds to Andres Serrano. A Serrano photograph -- which depicted a plastic crucifix submerged in the artist's urine -- was assailed in Congress as blasphemous and sacrilegious, and ultimately served as a direct catalyst for passage of the "decency respect" clause at issue here. *See Finley v. National Endowment for the Arts*, 100 F.3d 671, 677 n.10 (9th Cir. 1996) (citing 135 Cong. Rec. H3637, H3640 (July 12, 1989)).

Third, the Foundation and the NEA frequently provide direct funding to the same individuals or arts organizations. Over the years, the two groups have joined in hundreds of these informal collaborative efforts, often supporting innovative works that generate substantial debate and controversy. For example, both the NEA and the Foundation funded Bill T. Jones's "Still/Here," a highly contentious interdisciplinary dance work featuring images of people living with AIDS and other life-threatening diseases.[2] The two organizations also jointly funded an exhibition at the Whitney Museum of American Art

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[2] *See, e.g.*, Jan Breslauer, *Mortal combat choreographer Bill T. Jones kicked off a war of words with "Still/Here," an exploration of mortality that some called "victim art,"* L.A. Times, Apr. 23, 1995, at 8 (describing controversy surrounding "Still/Here"); Jane Vranish, *Dancing on the edge: it was a year of risk-taking*, Pitt. Post-Gazette, Dec. 29, 1995, at 15 ("Due to its highly charged material, ['Still/Here'] caused the biggest controversy the dance world has seen in 40 years.").

entitled "Black Male: Representations of Masculinity in Contemporary American Art," which drew intense criticism from diverse perspectives.[3]

At each level of the co-funding relationship, the success of Foundation grants depends on the cooperation of the NEA. Consequently, limits on the agency's discretion to award grants, such as the "decency and respect" provision, will necessarily restrict the Foundation's ability to support artistically worthy projects. This is also true with respect to the other ways in which the Foundation collaborates with the NEA. The limits do so, moreover, in a systematically biased way, by excluding the possibility of funding daring and controversial challenges to conventional mores.

The NEA's dominant position in the national arts community exacerbates the problems inherent in ideologically motivated federal funding decisions. Even with its reduced budget,[4] "the Arts Endowment remains the largest single source

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[3] *See, e.g.*, Hilton Kramer, Black Male*'s Blackmail Raises Foucault's Ghost*, N.Y. Observer, Nov. 21, 1994, at 25 (criticizing exhibit as focusing more on "political outreach" than "artistic quality"); Yasmin Ramirez, *The Whitney Museum on Gender: Half the Picture*, Ms., Nov./Dec. 1994 (arguing that exhibit "underplay[ed] a whole artistic tradition of black women experimenting with notions of 'maleness'"); Deborah Solomon, *Whitney Solves U.S. Race Problem*, The Wall Street Journal, Nov. 11, 1994, at A11 (suggesting that some works in exhibit "perpetuate[d] cheap stereotypes").

[4] Congress has sharply reduced the NEA budget in recent years, and it is unlikely that private arts supporters will be able to make up the difference. *See, e.g.*, NEA, *Guide to the NEA: Strategic Plan* (visited Feb. 2, 1998) <http://arts.endow.gov/Guide/Facts/Myth.html> ("The presumption that private giving will supplant any loss of federal funds is without foundation. . . . Taking away the federal 'seed' money will not encourage arts funding to grow, but just the opposite. Leaders from the philanthropic sector have flatly stated that they would not be able to take up the slack."); Nina Kressner Cobb, President's Committee on the Arts and the Humanities, *Looking Ahead: Private Sector Giving to the Arts and the Humanities* 33 (1996) ("[I]t is clear that with increased demands on their limited resources, private foundations will not be able to replace federal funds."); *id.* at 20 (quoting foundation official's statement that "it is absurd to think that the philanthropic sector can fill the funding gap.").

of national leadership and support for the arts in America." NEA, *Guide to the NEA: Strategic Plan* (visited Feb. 2, 1998) <http://arts.endow.gov/Guide/Strategic/Intro.html>. The NEA stimulates private arts assistance through a combination of explicit matching requirements -- which typically provide that NEA funding for a particular project will match a given proportion of that raised from private or public sources -- and indirect influence. The agency's efforts in this regard have produced extraordinary results, leveraging nearly ten dollars in private support for every one dollar in federal arts contributions.[5]

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[5] Testifying before Congress in 1994, former NEA Chairperson Jane Alexander stated: "Endowment grants serve as a major catalyst for leveraging nonfederal support. In FY 93, for example, Endowment grants of about $120 million generated matching funds estimated at $1.1 billion, a ten-fold match." Department of the Interior and Related Agencies Appropriations Act, 1995, Hearings on H.R. 4602, Before the Subcomm. on Interior and Related Agencies of the House Comm'n on Appropriations, 103d Cong. 297 (Apr. 20, 1994) (testimony of Jane Alexander, NEA Chairperson). *See also, e.g.*, NEA, *Guide to the NEA: Strategic Plan* (visited Feb. 2, 1998) <http://arts.endow.gov/Guide/ Facts/Tenfacts.html> ("One Endowment dollar attracts many more dollars for the arts from state, regional and local arts agencies, foundations, corporations, businesses and individuals."); NEA, *Arts in America 1990: The Bridge Between Creativity and Community* 9 (1990) (estimating that in 1989, $119 in federal grants generated over $1.36 billion in private funds).

Political involvement in federal funding impedes the free flow of artistic ideas even where the NEA plays no direct funding role. Because of the scarcity of public and charitable arts support, artists and arts organizations will steer clear of potentially controversial initiatives, even in non-NEA projects, for fear of jeopardizing future applications to the NEA or private regranting institutions. Those institutions, in turn, will avoid any contact with experimental artists to ensure continued support from the NEA on future projects. This is no mere theoretical possibility. In the early stages of the controversy over Robert Mapplethorpe's NEA-supported photography, for example, the threat of congressional disapproval drove the Corcoran Gallery of Art in Washington, D.C., to cancel a planned exhibit of the artist's work.[6]

Furthermore, because of the NEA's reputation in the art world, agency funding decisions reverberate long after grantees make use of federal funds. NEA awards confer an imprimatur of quality on an artist or organization, significantly improving the grantee's chances of securing outside funding in the future. As the President's Committee on the Arts and Humanities explained,

> There is a clear parallel between the federal investment in culture and the willingness of corporations, foundations and individuals to support cultural activity. . . . The overwhelming evidence is that the federal 'imprimatur,' or 'seal of approval' as it is often called, convinces other funding sources to contribute. The federal agencies establish national merit-review procedures that

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[6]*See, e.g.*, Barbara Gamarekian, *Corcoran, to Foil Dispute, Drops Mapplethorpe Show*, N.Y. Times, June 14, 1989, at C22.

> demonstrate that a proposal has passed rigorous evaluation -- a review many corporate and foundation officials take into serious consideration.

President's Committee on the Arts and Humanities, *Creative America: A Report to the President* 24 (Feb. 1997).[7] Conversely, when the agency rejects a grant application on the basis of the proposal's purportedly "indecent" or "disrespectful" nature, the stigma can be devastating.

Although these concerns affect all private charitable organizations, they are particularly troublesome for the Rockefeller Foundation, which is committed to encouraging new and daring art that might not attract other funding because it is unfamiliar, novel, or even controversial. The pervasive chilling effect of the challenged provision likely will strike hardest at experimental art, as needy artists and art organizations attempt to conform their artistic expression to the government's notions of "decency and respect."[8] In light of the

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[7]*See also, e.g.*, Nina Kressner Cobb, President's Committee on the Arts and the Humanities, *Looking Ahead: Private Sector Giving to the Arts and the Humanities* 19 (1996) ("An important indicator of the catalytic role that NEA plays is the degree to which prior or contemporaneous NEA support of a program is taken into account by private funders in evaluating applications for funding. Most program officers at foundations with arts programs view the receipt of an NEA grant as a sign that an organization has attained a level of sound organization structure and/or artistic excellence."); *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 783 (C.D. Cal. 1991) ("NEA grants lend prestige and legitimacy to projects and are therefore critical to the ability of artists and companies to attract non-federal funding sources.") (citation omitted).

[8]According to Charlotte Murphy, Executive Director of Respondent National Association of Artists' Organizations (NAAO), NAAO members are "afraid that the 'general standards of decency' requirement will bar them from

practical realities of arts funding, artists may feel compelled to forsake their natural creative impulses in favor of blander, more homogenous projects. Similarly, the threat of NEA sanctions will lead museums and other arts institutions to distance themselves from innovative, controversial works.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a First Amendment challenge to 20 U.S.C. § 954(d)(1), which requires the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" when judging arts grant applications. NEA enforcement of the "decency and respect" restriction substantially threatens the "climate encouraging freedom of thought, imagination, and inquiry" that it is the NEA's statutory mission to foster, 20 U.S.C. § 951(7), and the First Amendment's central function to protect. The widespread creation and dissemination of artistic expression depends on philanthropic support. As demonstrated above, private and public sources of that support are inextricably linked in myriad ways. Restrictions applicable to NEA funding will reverberate through the entire process of arts funding, and will significantly inhibit the creative choices of the many artists

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receiving NEA funding" because "new and contemporary art of the type presented or created by many NAAO members is by definition often provocative and threatening to traditional or conservative values or notions of morality." J.A. 21-22.

These groups already bear the brunt of nationwide reductions in art support. *See, e.g.*, Nina Kressner Cobb, President's Committee on the Arts and the Humanities, *Looking Ahead: Private Sector Giving to the Arts and the Humanities* 5 (1996). ("Small, innovative and community-based arts organizations will lose the most in the competition for private dollars and declining public funds.").

dependent on such funding. This case, therefore, is about much more than the rights to self-expression of the Respondents in the present dispute, or even of NEA grantees generally -- important as those rights are. Ultimately, this case is about whether our nation's cultural life will be characterized by a commitment to the uninhibited, robust, and wide-open exchange of ideas, or will instead be hedged-in, distorted, and homogenized by the Government's efforts to discriminate against daring and controversial artistic challenges to conventional mores and beliefs.

The "decency and respect" restrictions of 20 U.S.C. § 954(d)(1) are unconstitutional because "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1994) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). Viewpoint discrimination is intolerable because "each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence," free of government efforts to "manipulate the public debate." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). As the Court has recognized, "[o]ur political system *and cultural life* rest upon this ideal." *Id.* (emphasis added). Had Congress enacted a law expressly forbidding the NEA from funding any artistic endeavor that portrayed homosexuality favorably or religion unfavorably, such a provision would be subject to "the most exacting scrutiny" (and certainly invalidated) because it attempts to "suppress [or] disadvantage" speech based on the views espoused. *Id.* at 642. But § 954(d)(1) is, in substance, just such a law. Congress adopted it in the wake of controversies over NEA funding of artistic expression by Robert Mapplethorpe and Andres Serrano that was vociferously

attacked as indecent and disrespectful of traditional values. The amended law tilts the scales against sucn art. In other words, it instructs the NEA to withhold otherwise generally available funding for meritorious art precisely when a work has "strong communicative content, protesting conventional norms or giving an edge to a work by conveying otherwise inexpressible emotions." *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2416 (1996) (opinion of Kennedy & Ginsburg, JJ.) (internal quotation marks and citation omitted). Such a law offends the First Amendment's core principles.

Congress has no more power to discriminate against unconventional views when it is funding private expression than when it is restricting private expression directly. To the contrary, ideologically driven attempts to suppress a particular viewpoint are presumptively unconstitutional in all contexts. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). To be sure, when the government speaks -- either directly or through others -- it may choose the message. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 194 (1991). But, as the Government concedes, NEA grants do not act as a vehicle for conveying a particular government message. Petitioners' Brief at 35. Rather, NEA subsidies are expressly intended to encourage a diversity of thought and expression, much like government's funding of a public university or creation of a public forum. Consequently, because the NEA grant-making scheme facilitates a broad range of private art speech, the First Amendment prohibits Congress from restricting NEA funds in a way that discriminates on the basis of a recipient's viewpoint.

This neutrality mandate is made even more imperative by NEA's central position in the art world, because the NEA's ideologically-based funding decisions will have a widespread impact on the free exchange of artistic ideas across the nation. Public-private partnerships will no longer be possible respecting a broad range of programs and projects that NEA may deem too unconventional or shocking. Individual artists and arts organizations will shy away from art challenging conventional norms, to avoid putting their future eligibility for NEA funds at risk. These pressures to conform are made more intense by the reputation-enhancing quality of an NEA grant. Because the imprimatur of such a grant can make all the difference in the career of an artist or the stature of an arts organization, the "decency and respect" provision creates powerful incentives to steer clear of daring or challenging perspectives. Such widespread chilling effects are utterly inconsistent with the First Amendment's commitment to uninhibited, robust, and wide-open debate.

ARGUMENT

I. THE NEA GRANT-MAKING SCHEME DEMANDS GOVERNMENT NEUTRALITY

A. Because it encourages a diversity of views from private speakers in a traditional sphere of free expression, the NEA grant-making process demands government neutrality.

Artistic speech enjoys full First Amendment protection. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (film). Art is thus

constitutionally shielded not only from outright government suppression, but also from discriminatory funding practices.

In the context of government subsidies, as with speech regulation generally, the prohibition on viewpoint discrimination lies at the heart of the First Amendment. *See, e.g.*, *Rosenberger*, 515 U.S. at 828 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("'[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.'" (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 805 (1985))); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983) (noting that the government may not "discriminate invidiously in its subsidies in such a way as to aim[] at the suppression of dangerous ideas") (internal quotation marks and citation omitted).

Whether viewpoint discrimination in government funding violates the First Amendment depends on the nature of the subsidy program at issue. In certain instances, when the government itself "is the speaker or when it enlists private entities to convey its own message," *Rosenberger*, 515 U.S. at 833, the state has greater leeway to limit the viewpoints expressed by subsidized speech. *See, e.g.*, *Rust*, 500 U.S. at 194 (upholding speech restrictions on federal family planning program using private speakers to advance governmental goals). Commissioned works of art designed to commemorate national historic figures or events, for example, may properly be confined in their message and scope. But "when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a

diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, the First Amendment forbids viewpoint-based restrictions. Furthermore, as the Court recognized in *Rust*, strict neutrality should be required for government subsidies in "traditional sphere[s] of free expression," such as public universities and public fora. *Rust*, 500 U.S. at 200.

Through the NEA grant-making process, Congress has encouraged the dissemination of a diversity of creative ideas in a traditional sphere of free expression. As the Court of Appeals correctly concluded, "the arts, no less than the university, are 'at the core of a democratic society's cultural and political vitality.'" *Finley*, 100 F.3d at 682 (quoting *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1473 (C.D. Cal. 1992)). Indeed, recognition of art's fundamental importance to a free, vibrant national community underlay the establishment of the NEA. The Senate Report accompanying the agency's creation, for example, emphasized that the arts "'are at the center of our lives and are of prime importance to the Nation and to ourselves. . . . Very simply stated, it is in the national interest that the humanities and arts develop exceedingly well.'" S. Rep. No. 89-300, at 7 (1965) (quoting statement of Dr. Barnaby C. Keeney, Chairman of the Comm'n on the Humanities); *see also, e.g.*, 20 U.S.C. § 951(10) ("It is vital to a democracy to honor and preserve its multicultural artistic heritage. . . .").

In creating the NEA, Congress emphasized the need to promote diverse artistic expression unfettered by political biases. The Senate Report's "Freedom of Expression" section, for instance, stated that the intent of the NEA's enabling legislation "should be the encouragement of free inquiry and expression," and that "no undue preference should be given to any particular style or school of thought or expression." S.

Rep. No. 89-300, at 4. (1965). Similarly, the statute's "Declaration of findings and purposes" stressed that the "Federal Government [should] help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry."[9] 20 U.S.C. § 951(7). These principles of neutrality have remained central to the NEA's mission over the years, as confirmed in a 1985 House Report suggesting that the NEA's funded programs "should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free." Arts, Humanities and Museums Amendments of 1985, H.R. Rep. No. 99-274, at 13 (1985).

Having created a program to subsidize a vast range of private expression, Congress cannot categorically exclude from that benefit persons or works with controversial or unpopular viewpoints. In light of the paramount importance of free artistic expression in our democratic society, and in view of the NEA's role in fostering richly diverse artistic endeavors, the NEA's funding procedures must conform to the strictures of viewpoint neutrality.

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[9]*See also, e.g.*, 111 Cong. Rec. 23665 (1965) (statement of Rep. Annunzio) ("Government support of the arts and humanities is not to replace private initiative, reduce private responsibility, or restrict artistic freedom."); *id.* at 23963 (statement of Rep. Monagan) (noting purpose of NEA to provide "Government assistance, but not intervention . . . support but not control . . . stimulation but not participation.").

B. The fact that the NEA must evaluate grant applications on the basis of their artistic merit does not permit the NEA to deny those applications because of government's disapproval of their viewpoint.

Although it is conceded that NEA grants do not constitute the government's "own speech," *Rosenberger*, 515 U.S. at 834, and do not convey a "governmental message," *id.* at 833, Petitioners' Brief at 35, the NEA nonetheless argues that viewpoint neutrality cannot be required in a subsidy arena in which the government already makes certain content-based judgments, i.e., those based on artistic merit. This argument, however, ignores the distinction between permissible content-based decisions that promote the essential functions of a "traditional sphere of free expression," and prohibited viewpoint-based restrictions that are, at best, incidental to a subsidized program's primary purpose.

In the related context of public education funding, this Court consistently has drawn a clear line between allowable, and even necessary, judgments that advance an institution's academic goals, and unconstitutional viewpoint-based determinations unrelated to the educational mission. For instance, the Court has emphasized that while school boards "rightly possess significant discretion to determine the content of their school libraries[,] . . . that discretion may not be exercised in a narrowly partisan or political manner." *Board of Educ. v. Pico*, 457 U.S. 853, 870 (1982) (plurality opinion). Similarly, although a state can provide funding to hire public university professors on the basis of academic criteria, it cannot condition employment on factors unrelated to the educational mission, thereby "cast[ing] a pall of

orthodoxy" over its schools. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).[10]

As in the educational setting, the fact that the NEA distributes art subsidies according to artistic merit does not give the agency license to favor one set of viewpoints or perspectives over another. Just as schools may limit public subsidies to speech that is "related to . . . educational purpose[s]," *Rosenberger*, 515 U.S. at 824, the government properly may apply aesthetic criteria in arts funding. It is not inherently illegitimate for the government to make aesthetic judgments that are viewpoint-neutral. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (regarding aesthetics as "substantial governmental goal[]"); *Miller v. California*, 413 U.S. 15, 24 (1973) (distinguishing, for obscenity law purposes, works that have "serious" artistic value); *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1051 (2d Cir. 1988) (observing that "the state may regulate the display and location of art based on its aesthetic qualities"). The application of neutral standards aimed at promoting the NEA's artistic mission, however, does not permit the agency to ignore long-standing constitutional proscriptions against viewpoint discrimination. *See, e.g., Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (noting that, while aesthetic restrictions are permissible, "the First Amendment forbids the government

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[10]Likewise, subsidies for the press, another "sphere of free expression," also demand strict neutrality. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (noting that selective allocation of benefits to the press "is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987) (invalidating discriminatory subsidization of the press through tax exemption).

to regulate speech in ways that favor some viewpoints or ideas at the expense of others").

In suggesting that the NEA's exercise of artistic discretion over its limited funds overrides the First Amendment's prohibition on viewpoint discrimination, the Government disregards *Rosenberger's* discussion of resource scarcity. This Court in *Rosenberger* squarely addressed and rejected the notion that economic scarcity can justify non-neutral subsidization. *Rosenberger*, 515 U.S. at 835. In the face of such limitations, the Court explained, the state cannot favor particular ideas or schools of thought but must instead allocate available resources based "on some acceptable neutral principle." *Id.* Through the establishment of the NEA, Congress has done just that by distributing funds on the viewpoint-neutral criteria of artistic merit and excellence.

C. The NEA's mission in encouraging free inquiry and expression is consistent with the complex nature of artistic speech.

Petitioners argue that because some art may lack a single "express message," Congress could not have intended the NEA to serve as a vehicle for the free exchange of ideas. Petitioners' Brief at 30-31 & n.9. This contention is flawed in several respects.

First, neither case law nor logic support Petitioners' suggestion that the mere presence of some ambiguous speech in a government-subsidized program will overcome the state's otherwise clear intent to encourage diverse private expression. If that were the case, then the fact that a public university library contained, for example, a dictionary or a mathematics textbook -- neither of which are "communicative in the same

sense as conventional speech on matters of public concern," Petitioners' Brief at 30 -- would strip the library of its protection from viewpoint discrimination. Similarly, under the Petitioners' view, the inclusion of an apolitical student "entertainment" group in the University of Virginia's reimbursement program in *Rosenberger*, 515 U.S. at 824, would preclude this Court's determination that the University intended to facilitate free private expression. Surely, *Rosenberger's* teachings cannot be so rigidly applied as to remove the neutrality mandate any time some subsidized speech fails to advance a "single, identifiable message." Petitioners' Brief at 30-31.

Second, Petitioners' argument misperceives the constitutional value of art speech. Artistic expression is unique in its ability to inspire a host of intellectual, interpersonal, and spiritual responses. Art speech is thus vital to the First Amendment because, in addition to advancing straightforward, singular messages,[11] art's creative, often imprecise nature affects audiences in ways mere words cannot. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (explaining that nonpolitical speech that entertains may "affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression"); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) ("The ideas and concepts embodied in visual art have the power to transcend . . . language limitations and reach beyond a particular language group to both the educated and the

[11]Petitioners concede that art, as with other forms of speech, can express distinct, readily identifiable ideas. *See* Petitioners' Brief at 30 n.9 ("To be sure, many art forms -- most obviously, literature and theatrical arts -- may convey more explicit linguistic or symbolic messages.").

illiterate. . . . [V]isual images are 'a primitive but effective way of communicating ideas . . . a short cut from mind to mind.'" (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943))), *cert. denied*, 117 S. Ct. 2408 (1997).

Repressive regimes historically have viewed the persuasive power of artistic expression as a threat. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known [music's] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state."). Because of the same insights, Congress has, through the NEA, recognized art speech as "vital to a democracy." 20 U.S.C. § 951(10).

Having "expended funds to encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, Congress cannot now escape the neutrality mandate so crucial to the vitality and integrity of this "traditional sphere of free expression," *Rust*, 500 U.S. at 200.

II. THE "DECENCY AND RESPECT" PROVISION IMPOSES UNCONSTITUTIONAL VIEWPOINT-BASED RESTRICTIONS ON NEA GRANTS

The "decency and respect" clause unconstitutionally discriminates against artists and art organizations on the basis of their viewpoint.

A. On its face, the "decency and respect" provision imposes impermissible viewpoint-based criteria on NEA grants

The "decency and respect" amendment is facially discriminatory against particular views and perspectives. Most problematically, it requires the NEA to consider whether an applicant demonstrates "respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1). Regardless of artistic merit, a work may be denied federal funding simply because of a perceived "disrespect" for American beliefs and values. In many cases, this prohibition can serve to silence expressly political viewpoints, as in the flag example offered by the Court of Appeals. *See Finley*, 100 F.3d at 683.

The "respect" requirement can also facilitate the elevation of one religious art perspective over another, an even more egregious form of viewpoint discrimination than that invalidated in *Rosenberger*. Take, for example, Andres Serrano's "Piss Christ," the likes of which the "decency and respect" clause was specifically designed to screen out. Because of its apparently[12] "disrespectful" message -- in the words of Senator Jesse Helms, the "denigrati[on] of our Lord, Jesus Christ," 136 Cong. Rec. S18002 (October 24, 1990) -- the work presumably would be denied funding under the amended NEA statute. On the other hand, the "respect"

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[12]As is often the case, Serrano's intentions were not as neatly and easily defined as his critics would believe. *See, e.g.*, Associated Press, *Immersing Christ in urine an attempt to humanize him, says artist*, AP Worldstream, Oct. 10, 1997 (according to Serrano, "'Piss Christ' is a representation of the pain and suffering Christ underwent for all of us. My use of fluids like blood or urine is a way of humanizing him and identifying with his indignity and sorrow.").

restriction would not reach -- indeed, could not reach under *Rosenberger*, 515 U.S. at 831-32, and *Lamb's Chapel*, 508 U.S. at 394-95 -- a photograph with an overtly pro-religious viewpoint. Thus, the "respect" clause impermissibly targets "[t]he prohibited perspective" of an anti-religious message, "not the general subject matter"of religion. *Rosenberger*, 515 U.S. at 831. If, as *Rosenberger* has taught, the government may not silence "an entire class of [religious] viewpoints," *id.*, then surely it cannot target for exclusion one distinct, narrow, minority position on the subject.

The "decency" limitation, read in conjunction with the "respect" clause, also operates to stifle a particular set of artistic viewpoints. The shocking character of speech may be inextricably linked to its message. *See, e.g., Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2415-16 (1996) (Kennedy & Ginsburg, JJ., concurring in part, concurring in the judgment in part, dissenting in part) ("In artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying otherwise inexpressible emotions. . . . Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with the loss of truth or expressive power.") (internal quotation marks and citation omitted); *Cohen v. California*, 403 U.S. 15, 26 (1971) ("We cannot sanction the view that the Constitution . . . has little or no regard for [the] emotive function [of vulgar speech] which, practically speaking, may often be the more important element of the overall message sought to be communicated.").[13] For that

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[13]As noted in the Senate Report accompanying the NEA's enabling statute, "One of the artist's and humanist's great values to society is the mirror of self-examination which they raise so that society can become aware of its

reason, the regulation may silence the perspectives of artistically worthy artists or organizations that seek to challenge conventional thought and accepted beliefs.[14]

Stripped of the ability to challenge, question, and confront traditional beliefs and practices, art speech will begin to lose its cultural and political relevance. The First Amendment forbids this result. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) ("[A] principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs

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shortcomings as well as its strengths." S. Rep. No. 89-300, at 3 (June 8, 1965); *see also, e.g., American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 814 (D.D.C. 1986) (invalidating as viewpoint discrimination Librarian of Congress's decision to stop funding braille translation of Playboy magazine because of "sexual orientation of the magazine").

[14]Petitioners' reliance on *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), as support for the NEA's broad authority to restrict "offensive" speech, Petitioners' Brief at 39-40, is misplaced. In upholding the broadcast regulation in *Pacifica*, this Court identified a number of key factors not present here, including the special nature of broadcast media, the potential intrusion of the offensive speech into the home, and the fact that the regulation only applied during times when children might hear the broadcast. *Pacifica*, 438 U.S. at 748-50; *see also Reno v. ACLU*, 117 S. Ct. 2329, 2342-43 (1997) (invalidating ban on "indecent" material on Internet, and distinguishing "'emphatically narrow holding' in *Pacifica*" (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989))). Similarly, the decision in *Bethel* rested on the fact that the regulated speech at issue was presented at an assembly to "children in a public school," and not to "adults in [an]other setting[]." *Bethel*, 478 U.S. at 682 (distinguishing *Cohen v. California*, 403 U.S. 15 (1971)).

Most importantly, the regulations on "indecent" speech in *Pacifica* and *Bethel* were not nearly as broad as the NEA rule challenged here, as they contained no requirement of conformity to promote "respect for the diverse beliefs and values of the American public."

people to anger.'" (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949))).

B. The history of the "decency and respect" provision indicates clear congressional intent to target unpopular viewpoints.

A brief examination of the legislative history of the "decency and respect" provision confirms its viewpoint-discriminatory character. Prior to 1989, the NEA had judged grant applications solely on the basis of artistic merit. However, in the furor over several controversial photographs by Robert Mapplethorpe and Andres Serrano displayed with the support of NEA funds, Congress sought to amend the agency's authorizing statute. In floor debates concerning various proposed amendments, Congress expressed its unmistakable displeasure with the perceived messages conveyed by the controversial art. *See, e.g.*, 136 Cong. Rec. S18002-3 (Oct. 24, 1990) (statement of Sen. Helms) (expressing outrage that Serrano "went out of his way to insult the Christian community"); 135 Cong. Rec. H3581 (July 12, 1989) (statement of Rep. Kasich) (condemning "such scurrilous attacks on religious beliefs").[15] Congress passed the "decency and respect" amendment in 1990 after being stymied in its attempt to add an "obscenity" provision to the statute a

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[15]*See also, e.g.*, 136 Cong. Rec. H9410 (Oct. 11, 1990) (statement of Rep. Coleman) ("Works which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds."); 136 Cong. Rec. H9439 (Oct. 11, 1990) (statement of Rep. Dornan) ("Serrano's loathsome picture of Christ was both blasphemous and bigoted.").

year earlier.[16] Given the political climate in which the new provision arose, it is not surprising that Representative Henry characterized the "decency and respect" clause as "a shell, a screen, *a viewpoint* that must be constantly taken into account" in dispensing NEA grants. 136 Cong. Rec. H9417 (Oct. 11, 1990) (statement of Rep. Henry) (emphasis added).

Petitioners attempt to cast the "decency and respect" requirement as an unremarkable clarification of standards that "necessarily inhere in the evaluation of . . . 'artistic excellence' -- and especially . . . 'artistic merit.'" Petitioners' Brief at 45. This position, however, contradicts the clear legislative history described above, completely ignoring the political climate in which Congress passed the 1990 amendment. Furthermore, Petitioners' claim clashes with well-settled rules of statutory construction, for the "decency and respect" clause would be superfluous if the new criteria already figured into the statute's "artistic merit" calculus. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous.").

C. Enforcement of the "decency and respect" provision will have a devastating chilling effect on private artistic speech.

The government's use of viewpoint-based criteria to subsidize private speech threatens core First Amendment principles by "chilling . . . individual thought and expression." *Rosenberger*, 515 U.S. at 835. This danger is particularly acute in the context of the arts, where, as in the university

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[16] The "obscenity" provision was ultimately declared unconstitutional in *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 785 (C.D. Cal. 1991).

setting, "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Id.*

The NEA's dominant role in national arts funding magnifies the chilling problem. *Cf. Bella Lewitzky*, 754 F. Supp. at 783 (C.D. Cal. 1991) ("[T]he chilling effect caused by the [obscenity] certification provisions is exacerbated by the practical realities of funding in the artistic community."). Because NEA funding policy substantially affects an overwhelming amount of public and private arts activity in the United States, it is even more essential that the agency remain neutral in dispensing federal arts subsidies. As noted above, the NEA exerts a pervasive influence in the art world that extends far beyond the dollar amounts involved in direct federal grants. In light of the interdependent structure of arts funding in the United States and the NEA's immense influence within that system, federal arts policy has an enormous impact on individual artists, local arts organizations, state arts agencies, and private supporters such as the Rockefeller Foundation. Ideologically based restrictions on NEA grants thus will have a profoundly stifling impact on the national marketplace of artistic ideas.[17] In this context, the First Amendment's neutrality mandate must operate with particular vigilance and force.

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[17] *See, e.g.*, Donald W. Hawthrone, *Subversive Subsidization: How NEA Art Funding Abridges Private Speech*, 40 U. Kan. L. Rev. 437, 439 (1992) ("As long as the NEA retains its dominant role in the art world, the only constitutionally acceptable course for the NEA is to fund art on the basis of quality criteria and professional standards; for only these criteria and standards will ensure that government subsidization does not subvert our constitutional commitments.").

Enforcement of the "decency and respect" clause will channel private artistic speech, even in non-NEA projects, away from challenging, provocative works. In order to avoid the substantial practical consequences of NEA disapproval, artists will compromise their aesthetic integrity and produce more staid, conventional, and unremarkable art. Far from "encouraging freedom of thought, imagination, and inquiry," 20 U.S.C. § 951(~~7~~), then, the NEA will serve as means for preserving the status quo, muting unorthodox artistic voices at the expense of basic First Amendment principles. *See, e.g., West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is a fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.").

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,
Petitioners,

v.

KAREN FINLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INTEREST OF AMICUS*

Americans United for Separation of Church and State (Americans United) is a national, nonprofit public interest organization dedicated to preserving the constitutional principles of separation of church and state and religious liberty. Since its founding in 1947, Americans United and/or its members have participated either as parties or *amicus* in a majority of the leading church-state cases before this Court. Many of those cases have also involved free speech issues and, in particular, questions of viewpoint neutrality. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). In addition, one of Americans United's first issues concerned state censorship of the arts that favored one religious perspective over others. Americans United files this *amicus* brief in support of Respondents because the "decency and respect" provision impermissibly favors some religious perspectives over others while it invites public officials

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*Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37. Pursuant to Rule 37.6, *amicus*, Americans United for Separation of Church and State, discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

to rely on their own subjective judgments as to whether certain artistic depictions are disrespectful of the beliefs and values of the American people.

SUMMARY OF ARGUMENT

The "decency and respect" provision of the National Endowment for the Arts (NEA) funding program is unconstitutionally vague and promotes viewpoint discrimination. This Court, however, can strike down the provision without expanding on its holding in *Rosenberger v. Rector* at the expense of *Rust v. Sullivan*. Under *Rust*, the government can selectively subsidize certain programs through private entities without being required to fund alternative programs and without necessarily implicating free speech interests of recipients. This authority is not limited solely to instances where the government is speaking or using private speakers to communicate a government message.

The NEA funding program, however, meets a private speech exception to the *Rust* subsidy rule. As this Court recognized there and in *Rosenberger*, where a program has a significant expressive function or is expressly dedicated to enhancing free expression among private individuals by encouraging a diversity of views, and where that program

touches upon a traditional sphere of free expression such as the arts, the government's ability to impose content and viewpoint conditions is severely curtailed.

The "decency and respect" provision violates the First Amendment by imposing viewpoint criteria for grant approval, criteria that favor one religious perspective over others. The provision is also unconstitutionally vague because it allows NEA officials to rely on their own subjective views of whether proposed art is indecent and disrespectful of religious beliefs and values. For these reasons, the decision of the court of appeals should be affirmed.

ARGUMENT

I. SELECTIVE GOVERNMENT FUNDING OF PRIVATE ENTITIES DOES NOT NECESSARILY IMPLICATE FREE SPEECH INTERESTS.

This case highlights a tension between two important interests: the government's authority to accomplish its legitimate goals through the selective funding of private entities and the possible free speech interests of governmental grant recipients. This controversy does not exist in a vacuum, but is part of the much larger question of the ability of the government to define and control its programs, programs which inevitably involve

private individuals in one way or another. A holding for either Petitioners or Respondents has implications, in particular, for this Court's rulings respecting governmental aid to religious institutions and the government's authority outside of the Establishment Clause to limit funding for secular purposes and to secular entities. Moreover, the court of appeals decision relies extensively on *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), a case involving governmental subsidy of private religious expression, a decision some have argued extends beyond its particular speech context to authorize, if not mandate, religious participation in nonspeech grant programs.

Before examining the application of *Rosenberger* and *Rust v. Sullivan*, 500 U.S. 173 (1991), to the instant case, the Court should first consider the broader framework of the government's regulatory authority within funding programs. As a general matter, it is undisputed that the government, when acting in a plenary or proprietorial capacity and using governmental employees, can administer programs as it sees fit without being subject to equal protection or free speech claims. The government can, "without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program in another way." *Rust*, 500 U.S.

at 193; *accord Norwood v. Harrison*, 413 U.S. 455, 462 (1973). For example, the government could decide to fund only public education, to the exclusion of private education, even though both institutions could be seen as accomplishing the public goal of an educated citizenry. *Norwood*, 413 U.S. at 462; *Brusca v. Missouri State Board of Education*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972); *accord Maher v. Roe*, 432 U.S. 464, 477 (1977). Even where a governmental funding program implicates a protected right, the government may choose to fund only that program that advances its intended goals. *Rust*, 500 U.S. at 194; *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983). *Cf. Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (refusal to fund a "protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.").

This same principle holds true even where the government uses private entities to accomplish its functions and goals. *Rust*, 500 U.S. at 193-95; *Harris*, 448 U.S. at 314-15. Just as in the category involving government employees, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. Increasingly, the government is turning to

private entities to perform important governmental functions.[1] These grant and subsidy programs often involve proprietorial functions of the government that are indistinguishable from government-run programs but for the use of private contractors and grantees to perform governmental functions.

Even where speech is involved, the government may choose to fund some entities and not others. For example, the government could fund a program for counseling teenagers against drug abuse without being required to fund groups advocating the legalization of drug use. *See Regan*, 461 U.S. at 548-49. In some instances, the private grantee may be seen as communicating the government's message, while in others, the grantee may simply be engaged in furthering "sufficiently important governmental interests." *Buckley v. Valeo*, 424 U.S. 1, 95 (1976). In either situation, "the Government has not discriminated on the basis of viewpoint" by funding certain programs; rather, "it has merely chosen to fund one activity to the exclusion of the other." *Rust*, 500 U.S. at 193. So long as the governmental subsidy is not "aimed at the suppression of dangerous ideas," *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (quoting *Speiser v. Randall*, 357 U.S. 513, 519

[1] *See* Personal Responsibilities and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

(1958), the power of government "to encourage actions deemed to be in the public interest is necessarily . . . broad[]." *Maher*, 432 U.S. at 476.[2]

"These are scarcely novel principles." *Regan*, 461 U.S. at 549. Rather, they are crucial for the effective operation of the republic. In order to accomplish those policies and goals that represent the democratic will and advance the commonweal, the government must be able to selectively encourage certain activities it believes to be in the public interest without being required to encourage alternative programs or activities. *See Rust*, 500 U.S. at 193. To hold that the government has unconstitutionally discriminated against nonrecipients merely by deciding to fund certain programs would cripple the government's ability to operate efficiently and would render many programs suspect. *Id.* at 194; *Norwood*, 413 U.S. at 462.

The use of private entities and individuals to accomplish such goals does not necessarily change this formula. Because numerous government programs use private grantees and contractors to perform government functions, the mere funding of private entities does not implicate free speech interests. Even

[2] Accordingly, the government may appropriately attach regulations to the receipt of a grant, such as requiring grantees to comply with the antidiscrimination provisions of Title VII.

when those entities are not communicating a government message, subsidization does not necessarily deprive the government of the power to make speech-based distinctions. *See Rust*, 500 U.S. at 193-94. Thus, any construction of the law that limits the government's ability to control the application of public funds through private parties solely to instances where the government is the speaker or is expressly enlisting private parties to convey official messages is not true to this Court's holdings.

A different category of subsidy exists, however, where the government uses public funds "to encourage private speech." *Rosenberger*, 515 U.S. at 833. In one sense, this category represents the converse to the issue of a government speaker or surrogate and involves private individuals expressing their own messages. Its inquiry goes beyond the question of a private versus governmental message, however, to consider whether the overriding purpose or goal of the subsidy program is to encourage diverse views and enhance creative inquiry.[3] Where a program has a significant free speech function or is expressly dedicated to speech activity, and the government has declared its intention to encourage a "diversity of views from

[3] *Cf. FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984) (asking whether a restriction is "specifically directed at a form of speech").

private speakers," viewpoint neutrality is required. *Id.* at 834; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993).[4]

The Court's *Rosenberger* decision fits within this third category of government programs. Crucial to the Court's holding was the fact that the Student Activity Fund (SAF) was designed to encourage "a diversity of views from private speakers" and to enhance "free speech and creative inquiry." *Rosenberger*, 515 U.S. at 834, 836. The Court also emphasized the special nature of the university with its tradition of unimpeded intellectual thought and academic freedom. *Id.* at 835-36, 850. Finally, the Court noted that the messages contained in the funded speech were attributable only to private individuals and not to the government. *Id.* at 834-35. Based on these factors, the university's denial of funding for a student publication with a religious perspective constituted viewpoint discrimination.[5]

[4] A final category would involve purely private speech outside of a funding context. "It is axiomatic [in this category] that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828; *accord Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

[5] Importantly, though, this Court emphasized that, notwithstanding the purpose of the SAF, the university could exercise content

These factors distinguished the SAF from the funding programs in *Rust*, *Harris*, and *Maher* and thus produced a different result.[6] More important, *Rosenberger* is fundamentally a free speech case involving a "traditional sphere of free expression." *Rust*, 500 U.S. at 200. It has scant application to government funding programs that fit within either of the first two categories. As this Court reaffirmed in *Rosenberger*, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. . . . When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." 515 U.S. at 833.[7]

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selectivity through its subsidy. *Id.* at 826 (noting that if the religious publication, Wide Awake, had been a *religious* organization, it would have fallen outside the category of organizations eligible for funding).

[6] As a further distinction from the *Rust*-type program, the Court also analogized the SAF to a public forum: "The SAF is a forum more in a metaphysical than in a spacial or geographic sense, but the same principles are applicable." *Rosenberger*, 515 U.S. at 830.

[7] On this point, the Court was unanimous. As Justice Souter stated for the dissenters, "when determining whether a speech restriction is content based or content neutral, '[t]he government's purpose is the controlling consideration.'" *Id.* at 894 (Souter, J., dissenting) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Thus *Rosenberger* cannot be seen as mandating the funding of other activity or rights merely because the government has chosen to accomplish its goals through the selective use of private entities. *Rust*, 500 U.S. at 193; *Regan*, 461 U.S. at 548-49. Nor should it be viewed as narrowing the earlier rule represented in the holdings of *Rust*, *Harris*, *Regan*, and *Maher*. Its holding is unique to those programs with significant free speech functions or those expressly designed to enhance a diversity of views through private expression.

II. THE CONSTITUTIONALITY OF THE NEA ARTS FUNDING PROGRAM IS GOVERNED BY ROSENBERGER V. RECTOR, NOT RUST V. SULLIVAN.

Because the NEA funding program is similar to the program in *Rosenberger* in its most important respects, the court of appeals correctly held that any substantive speech regulations in the program are subject to strict scrutiny.

Of primary significance is the fact that free expression is not merely a by-product of the funding program but is its very function. The National Foundation on the Arts and the Humanities Act, (NFHA Act) describes its purpose as "creat[ing] and sustain[ing] not only a climate encouraging freedom of thought, imagination, and inquiry but also the

material conditions facilitating the release of this creative talent." 20 U.S.C. § 951(5). The program here, unlike the one in *Rust*, expressly expends funds "to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. But even beyond this overriding purpose of enhancing "free speech and creative inquiry", *id.* at 836, a purpose that distinguishes the program from those in *Rust*, *Harris* and *Maher*, there is nothing to indicate that grant recipients somehow act as surrogates for government speech or are creating art for the benefit of the government.[8] Because the NFHA Act makes only the most laudatory of statements about the value of art, the government cannot be seen as conveying any official message through the subsidization program. As even the NEA acknowledges, the funding program is not a mechanism for communicating government messages. NEA Brief at 29.

Neither does the NEA funding program represent a traditional, proprietary function of the government. While the

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[8] It is ludicrous to equate the subsidy of artists under the funding program with the government's managerial acts of purchasing art for National Gallery of Art or the Smithsonian Institution. *See* Brief of American Center for Law and Justice at 4, 13 (likening the NEA to a "purchaser of art or a prize giver," thus effectively equating the recipient's art with "government speech.").

government has an important role in arts funding, it has neither the history nor plenary involvement that exists with many other government programs using private contractors. Moreover, artistic expression falls within one of those special contexts of a "traditional sphere of free expression." *Rust*, 500 U.S. at 200. Free expression, critique and creative inquiry, all central to academic freedom and intellectual growth in a university setting, *see Healy v. James*, 408 U.S. 169, 180-81 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), are no less indispensable to the arts. Also like the university, the important role the arts perform in the society as a whole can only be accomplished when it is uncensored. Indisputably, many of the same concerns that identify the special nature of the university apply equally to the arts.

The presence of these factors in the funding program leads to the conclusion that the NFHA Act has created a subsidy program in a "traditional sphere of free expression," such that the government is prohibited from attaching viewpoint controls to its expenditures. *Rust*, 500 U.S. at 200. These factors also outweigh any inference to be drawn from the selective nature of the grant process or the limited number of recipients. While the NEA is correct that only a small number of applicants are awarded grants, that fact has more to do with the reality of scarce resources than with reflecting a goal under the NFHA

Act to control artistic freedom through regulatory funding. Accordingly, the court of appeals correctly found that the funding program fits within an exception to the *Rust* rule, similar to the one presented in *Rosenberger*. The NEA is thereby prohibited from imposing viewpoint conditions in its funding decisions.

III. THE "DECENCY AND RESPECT" PROVISION AUTHORIZES PROHIBITED VIEWPOINT DISCRIMINATION.

Because the NEA funding program involves a traditional sphere of free expression, the government is required to be neutral in its grant-making and avoid discriminating on the basis of viewpoint. *Rosenberger*, 515 U.S. at 829; *Lamb's Chapel*, 508 U.S. at 393-94; *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). The "egregiousness" of viewpoint discrimination in such spheres is unquestioned. Government is forbidden from "discriminat[ing] invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Regan*, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

The principle inquiry for determining content neutrality is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The

government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *accord Rosenberger*, 515 U.S. at 894 (Souter, J., dissenting). "[R]egulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech.'" *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984) (quoting *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring in judgment)).

The "decency and respect" provision imposes a form of viewpoint discrimination. The 1990 amendment was enacted for the sole purpose of preventing government funding of particular perspectives on otherwise includable subjects. It prohibits the NEA from funding projects, regardless of their artistic merit, if they offend general standards of decency or are disrespectful of the beliefs and values of the American people. 20 U.S.C. § 954 (d)(1).[9] Thus art that is "respectful" of religious beliefs and values, such as a depiction of the Madonna and Child containing themes of adoration and devotion could be funded, whereas a

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[9] The word "belief" is commonly understood to have a religious meaning. *See* Webster's New International Dictionary, 2d ed. (1957) (defining "belief" as "a persuasion of the truths of region; faith; assent to a revealed truth on the authority of God.").

different depiction of the same subject-matter with Oedipal overtones would be rejected. Or, to take an example at the heart of the debate over the 1990 amendments, a depiction of a crucifix presented in a reverent and respectful manner would be eligible for funding whereas a depiction of a crucifix submerged in a vial of urine would not. This distinction amounts to viewpoint discrimination in its most egregious form, of distinguishing between differing views or presentations of identical subject-matter.[10] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (holding that viewpoint discrimination exists where only negative presentations of includable subject matter are prohibited); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959) (striking a statute that denied licensing to films that portrayed "acts of sexual immorality" favorably).

The First Amendment interests implicated in the decency and respect provision are only highlighted through the statute's preferential treatment of religion. This preference for "respectful" depictions of religious values and beliefs over art that some might term disrespectful or blasphemous implicates

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[10] "Religion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831.

the Establishment Clause by requiring the government to abandon its position of neutrality toward religion. *Board of Educ.. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994).[11] In *Joseph Burstyn, Inc. v. Wilson*, the Court struck down a statute that prohibited licensing of "sacrilegious" films, noting that under such a standard, even "the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another," and that "he would be subject to the inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority." 343 U.S. 495, 505 (1952). In the same manner, NEA officials must judge proposed art for any religious offensiveness (however that is determined) and then exclude art presenting that perspective. The funding program therefore puts the government in a position of preferring religious viewpoints over irreligious viewpoints and entangles NEA officials in religious matters through the review and vetting process.

This is not mere conjecture. During the debates over the 1990 amendments, members of Congress strongly criticized Andres Serrano's "Piss Christ," referring to it as "blasphemous",

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[11] But "[i]n the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

as "denigrating our Lord, Jesus Christ", and as "offensive to Judeo-Christian values." 136 Cong. Rec. 28654, 28658 (Oct. 11, 1990); 136 Cong. Rec. S17990 (Oct. 24, 1990).[12] "Piss Christ" was held out as the very type of art that should not be publicly funded because of its anti-religious perspective. Having received clear direction from Congress to deny funding of those art projects that are "disrespectful" of religious beliefs like "Piss Christ," the NEA will engage in a review process that not only discriminates against one perspective of includable subject-matter, but one that prefers "respectful" depictions of religious themes over those deemed disrespectful, thus implicating the Establishment Clause. *See Joseph Burstyn*, 343 U.S. at 505 (declaring that the application of the "sacrilegious test" raised "substantial questions under the First Amendment's guarantee of separate church and state with freedom of worship for all.").

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[12] One *amicus* in support of the NEA urges that the appropriate interpretation of the decency and respect clause is whether the depiction is "blasphemous." *See* Brief of Morality in Media at 4-5. Others urge an interpretation that prohibits funding of art with "immoral" themes. *See* Brief of National Family Legal Foundation at 14. As this Court stated in *Kingsley International Pictures*, however, the constitutional guarantee of freedom of speech "is not confined to the expression of ideas that are conventional or shared by the majority." 360 U.S. at 689.

IV. THE "DECENCY AND RESPECT" PROVISION IS UNCONSTITUTIONALLY VAGUE.

For many of the same reasons discussed in the previous section, the "decency and respect" provision is unconstitutionally vague. While constitutional concerns over vague laws have been most acute in the area of criminal law, courts have also applied heightened vagueness standards where laws "'abut[] upon sensitive areas of basic First Amendment freedoms'" and in turn operate "to inhibit the exercise of [those] freedoms." *Grayned v. City of Rockford*, 408 U.S. 102, 109 (1972) (quoting *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961)). "'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' *NAACP v. Button*, 371 U.S. 415, 438, '[f]or standards of permissible statutory vagueness are strict in the area of free expression.'" *Keyishian*, 385 U.S. at 603-604.

One way in which vague laws violate the Constitution is that they "impermissibly delegate[]" policy determinations to public officials "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 109. The vesting of "unbridled discretion" in government officials over whether to approve certain expressive activity, in the absence of clear

standards, invites those same officials to rely on "illegitimate criteria" for discriminating against disfavored speech. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757-58 (1988).

The indefiniteness of the "decency and respect" provision gives rise to such arbitrary and discriminatory application while it invites reliance on illegitimate criteria. It grants to NEA officials the power to deny funding applications if the proposals offend the officials' subjective religious beliefs and values. In particular, it invites them to rely on their own subjective views of what religious beliefs and values conform to dominant beliefs of the American people. The only guidance in this area comes from Congress, which has sent a clear message that blasphemous and disrespectful depictions of religious belief are not to be funded. Like the censors in *Joseph Burstyn*, NEA officials are thus "set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies." 343 U.S. at 504-05.

The NEA and its *amici* insist that the "decency and respect" provision is not unconstitutionally vague because this Court has previously upheld restrictions on free speech employing similar terms. *See* NEA Brief at 39-40; Brief of

American Center for Law and Justice at 22; Brief of National Family Legal Foundation at 7-14. But the authority upon which this argument relies, primarily *Bethel School District v. Fraser*, 478 U.S. 675 (1986), and *FCC v. Pacifica Foundation*, 438 U.S. 726, 740 (1976), is inapposite to a context like the NEA funding program. This Court has generally been willing to uphold the application of vague definitions of decency in cases involving impressionable children. In *Bethel*, the Court focused on the use of lewd and suggestive language in a captive audience of school children, 478 U.S. at 683-84, whereas in *Pacifica*, it was willing to uphold an "indecency" restriction primarily out of a concern that the pervasive and indiscriminate nature of the broadcasts made it likely that young children would be among the audience. *Pacifica*, 438 U.S. at 748-50. *Accord Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding ban on sale of sexually explicit, but not otherwise obscene, material to minors). But the Court has been unwilling to provide such latitude for vague statutes regulating speech outside of these contexts. *See Kingsley Inter. Pictures*, 360 U.S. 684 (rejecting the authority of state to refuse license for "immoral" or "indecent" films); *Joseph Burstyn*, 343 U.S. at 504-05 (striking ban on "sacrilegious" films). As was iterated in *Joseph Burstyn*:

> [T]he state has no legitimate interest in protecting any or all religions from views distasteful to them . . .. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

343 U.S. at 505.

CONCLUSION

For the foregoing reasons, *amicus* requests that the decision of the court of appeals be affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,

Petitioners,

—v.—

KAREN FINLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CLAES OLDENBURG, ARTHUR MILLER, JASPER JOHNS, HANS HAACKE, COOSJE VAN BRUGGEN, E.L. DOCTOROW, NANCY SPERO, LEON GOLUB, ANDRES SERRANO, ROBERT COLESCOTT, TONY KUSHNER, LUIS CRUZ AZACETA, TERRENCE McNALLY, BARBARA KRUGER, DAVID HAMMONS, ADRIAN PIPER, SUSAN ROTHENBERG, BRUCE NAUMAN, ERICA JONG, AND RICHARD SERRA, *AMICI CURIAE*, SUPPORTING RESPONDENTS

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Claes Oldenburg, Arthur Miller, Jasper Johns, Hans Haacke, Coosje van Bruggen, E.L. Doctorow, Nancy Spero, Leon Golub, Andres Serrano, Robert Colescott, Tony Kushner, Luis Cruz Azaceta, Terrence McNally, Barbara Kruger, David Hammons, Adrian Piper, Susan Rothenberg, Bruce Nauman, Erica Jong, and Richard Serra submit this brief as *amici curiae* in support of respondents. The parties to the action have given their written consent to the filing of this brief pursuant to Rule 37.3(a) of the Rules of this Court. The letters of consent have been filed with the Clerk.

INTEREST OF THE AMICI CURIAE

The *amici curiae* are 20 distinguished visual and literary artists, who share an interest that the creation of art be judged on standards of excellence and merit that are free of restrictions based on the viewpoint of the artist. Because the *amici* have extensive experience in the arts, they believe that they can offer the Court views about the creation and evaluation of the arts that are relevant to the Court's consideration of the issues in this case.

The visual artists among the *amici* have created works—sculpture, paintings, constructions, prints, photographs—that exemplify many of the major artistic movements since the 1940s. Works of these artists are included in the permanent collections of major museums in the United States and abroad, including the Smithsonian Institution, the National Gallery of Art, the Metropolitan Museum of Art, the Museum of Modern Art, the Art Institute of Chicago, the Pompidou Center in Paris, the Tate Gallery in London, the National Gallery of Canada, and the National Gallery of Australia.

The literary artists among the *amici* have created novels and plays that are read and produced worldwide, and the excellence of their work has been recognized with awards, such as the Pulitzer Prize, the Antoinette Perry Award (the "Tony"), the Emmy Award and the National Book Award.

Some of the *amici* have served on NEA panels of experts, and one was the recipient of an NEA grant earlier in her career.

The *amici* use their work as a vehicle for the expression of ideas, viewpoints, or beliefs, and they are troubled by any governmental effort to control protected expression in artistic work—whether directly or indirectly—through the selective withholding of subsidies. A work of one of the *amici*, Andres Serrano, which appeared in an NEA-funded exhibition, was attacked during the 1989 and 1990 congressional debates regarding the NEA, and the institution that exhibited the work was subsequently penalized, because some congressional representatives and their constituents perceived the work as blasphemous.

The work of visual and literary artists is often intended to challenge the viewer or reader and to provoke thought. The imposition of vague, viewpoint-based restrictions, such as the "decency" and "respect" provisions at issue in this case, as criteria for funding the arts infringes protected First Amendment expression. These provisions authorize public officials to apply such standards based on their personal interpretations, and they cause artists and arts organizations that rely on public funding to engage in self-censorship rather than risk the loss of funding. Not only do such vague standards squelch creativity and artistic innovation, they foster the proliferation of art striving to satisfy the lowest common denominator. Because the *amici* are concerned that artistic expression not be subjected to government censorship in the form of vague restrictions that invite judgment based on viewpoint, they join in urging this Court to affirm the court of appeals' decision.

SUMMARY OF ARGUMENT

1. The "decency" and "respect" provisions of the NEA statute conflict with the Fifth Amendment because they are unconstitutionally vague. Neither "general standards of

decency" nor "respect for the diverse beliefs and values of the American public" are terms that can be understood--without guesswork—either by NEA applicants or NEA personnel charged with making the funding decisions. Depending upon the perspective of the decision-maker, such terms could encompass much of the art that we flock to museums to see, because it might offend some Americans' views of what is politically correct, morally acceptable, sexually restrained, or religiously orthodox.

The vagueness of the terms makes the statute vulnerable to the very ills that the vagueness doctrine is meant to prevent: the exercise of unbridled discretion by the decision-maker and self-censorship by applicants anxious to avoid the statutory prohibitions.

2. The statutory standards of "artistic excellence" and "artistic merit" are not unconstitutionally vague. To evaluate art in a meaningful sense, the evaluator must have knowledge about the art work in question, experience in looking at similar works, and understanding of the history of art and recent developments in the art world. By requiring that the NEA advisory panels and the NEA Council be comprised of individuals knowledgeable in the arts, Congress recognized that such experts would have the requisite experience to make fair and informed decisions when determining which works have artistic excellence and merit. The expertise that qualifies the NEA panelists and Council members to make judgments about artistic merit, however, does not include reference to "standards of decency" and the "respect for the diverse beliefs and values of the American public." Furthermore, no definition of "artistic excellence" and "artistic merit" can include the conformity and orthodoxy necessarily imposed by the "decency" and "respect" provisions, because such standards are fundamentally antithetical to the making of art.

ARGUMENT

I

THE "DECENCY" AND "RESPECT" PROVISIONS OF THE NEA STATUTE ARE UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH AMENDMENT

On November 5, 1990, Congress passed the Arts, Humanities and Museum Amendments of 1990 (the "Act"), as the finale to a year of contentious debate brought about by congressional efforts to dictate the content and viewpoint of art funded by the National Endowment for the Arts ("NEA").[1] The Act amended the enabling legislation in certain respects; in particular, it amended 20 U.S.C. § 954(d) so that it now reads in pertinent part:

> No payment shall be made under this section except . . . in accordance with regulations issued and procedures established by the [NEA] Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> > (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
> >
> > (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity . . . shall not be funded. . . .

(the " 'decency' and 'respect' provisions" or "Section 954 (d)(1)").

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[1] Pet. App. 102a-103a. Pub. L. No. 101-512, § 318, 104 Stat. 1960 (1990), *reprinted in* 1990 U.S.C.C.A.N. (104 Stat.) 1960. Title I of the Act amended the National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. §§ 951 *et seq.*

Thus, under the amended statute, awards of NEA grants are ultimately contingent upon the NEA Chairperson's determination that the applications are consistent with "general standards of decency" and with "respect for the diverse beliefs and values of the American public." As implemented by the NEA Chairperson, each member of the peer review panels that review applications for NEA grants, each member of the National Council that advises the Chairperson, and all the state, local, and private arts organizations authorized to make subgrants of NEA funds are all charged with ensuring that their decisions consider "general standards of decency" and "respect for the diverse beliefs and values of the American public."[2]

Upon challenge by respondents, both the district court, Pet. App. 76a-78a, and the court of appeals, Pet. App. 14a-19a, invalidated the "decency" and "respect" provisions as unconstitutionally vague in violation of the Fifth Amendment's due process clause. As the court of appeals recognized, the "decency" and "respect" provisions are unconstitutional because " 'no standard of conduct is specified at all' " and "the statute thus provides no 'ascertainable standard for inclusion and exclusion.' " Pet. App. 17a (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) and *Smith v. Goguen*, 415 U.S. 566, 578 (1974)).

In the face of these holdings, the NEA persists in its contention that "Congress's use of imprecise terms in awarding grants does not penalize speech in any meaningful sense." Pet. Br. 47. This contention completely ignores the well-established principle that when a vague statute touches

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[2] *See* J.A. 12, 33; *Department of the Interior and Related Agencies Appropriations for 1992, Hearings before the Subcomm. on the Dep't of the Interior and Related Agencies of the House Comm. on Appropriations*, 102d Cong., 1st Sess. 234 (Feb. 21, 1991) (testimony of NEA Chairperson John Frohnmayer); *Department of the Interior and Related Agencies Appropriations for 1993, Hearings Before the Subcomm. on the Dep't of the Interior and Related Agencies of the House Comm. on Appropriations*, 102 Cong., 2d Sess. 613-14 (May 5, 1992) (testimony of NEA Chairperson Anne-Imelda Radice).

protected First Amendment expression, the vagueness doctrine "demands a greater degree of specificity than in other contexts." *Smith*, 415 U.S. at 573; *Buckley v. Valeo*, 424 U.S. 1, 41 (1976). And while a greater degree of vagueness is tolerated with respect to civil enactments because the consequences are less severe, that exception does not apply where a statute's vagueness "threatens to inhibit the exercise of constitutionally protected rights . . . [such as] free speech." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967). Section 954(d)(1)'s requirement that the evaluation of grant applications take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" does not satisfy, in any respect, the "greater specificity" standard required by *Smith* and *Hoffman*.

A. "General Standards Of Decency"

On its face, "decency" is defined in terms of vague and undefined standards of propriety or morality. According to The American Heritage Dictionary of the English Language 483 (3d ed. 1996), "decency" is

> the state or quality of being decent; propriety. . . . Conforming to prevailing standards or propriety or modesty,

and "decent" is

> characterized by conformity to recognized standards of propriety or morality. . . . Free from indelicacy; modest. . . . Meeting acceptable standards; adequate. . . . Morally upright; respectable. . . .

Such definitions do not provide the greater specificity required by *Smith* and *Hoffman* to save the phrase "general standards of decency" from unconstitutional vagueness. They provide artists and art institutions no guidance whatsoever about what qualities or elements, if found in an artistic work,

would trigger rejection under Section 954(d)(1), and they do not prescribe explicit standards for NEA judging officials to use in making funding determinations. As the court of appeals noted, "[the NEA decision-makers] have no . . . expertise in applying such free-floating concepts as 'decency' and 'respect.' " Pet. App. 19a n.18. Just as "one man's vulgarity [may be] another's lyric" (*Cohen v. California*, 403 U.S. 15, 25 (1971)), so too may works of art be "decent" or not depending on a viewer's own particular background and personal philosophy. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 742 (1978) ("for indecency is largely a function of context—it cannot be adequately judged in the abstract").

For example, what is "decent" is likely to run afoul of some viewer's standards of propriety regarding sexuality and nudity. Examples of art works that have provoked objections to allegedly explicit sexuality or excessive nudity range from Michelangelo's Last Judgment (1534-41) (App. 2a), to Rodin's "The Kiss" (1886-98) (App. 3a), to Édouard Manet's 1863 "Déjeuner sur l'herbe" (Luncheon on the Grass) (App. 4a), to much of the work of Egon Schiele,[3] whose oeuvre was recently featured in a retrospective exhibition at the Museum of Modern Art in New York City. In fact, Schiele's work was so offensive to his Austrian contemporaries, that in 1913 he was convicted of creating pornography at a trial during which the judge burned one of his pictures in the courtroom.[4] Although Michelangelo's "David" (1501-1504) (App. 5a) and Henri Matisse's "Hindu Pose" (1923) (App. 6a) managed to escape serious censure in their own times, each has been the subject of outrage in modern times: a replica of the David was seized in 1966 in Beverly Hills for "appearing without a figleaf" and the U.S. Post Office revoked the mailing permit

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[3] Jane Clapp, *Art Censorship: A Chronology of Proscribed and Prescribed Art*, 143-45, 167, 369 (1972).

[4] Frank Whitford, *Egon Schiele* 115 (1981).

of an issue of a fine arts publication because it contained reproductions of nudes, including "Hindu Pose."[5]

Even assuming that an artist applying for a grant could hazard a guess about what is meant by "decency" in the statute, the applicant could never know with any degree of certainty what is the "general standard" referred to in the statute or what "general standard" NEA decision-makers were using. Is the same general standard applied in Kansas City and New York City? If there are differing standards, who decides which standard to apply?

In *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997), this Court considered the Communications Decency Act of 1996 (the "CDA") which attempted to restrict access to speech on the Internet that was "indecent." 47 U.S.C. § 223(a) (Supp.1997). Like the NEA "decency" and "respect" provisions, the CDA did not further define or qualify "indecent." This Court invalidated the decency provision of the CDA statute, concluding that the vagueness of such terminology raised special constitutional concerns because of its "obvious chilling effect on free speech." *Reno*, 117 S.Ct at 2344. The NEA "decency" provision suffers from the same defect. Without further definition, "general standards of decency" provides no standard at all; worse, such a vague formulation both encourages the rejection of art because of the viewpoint the art may express and dampens the free expression of ideas by artists and arts organizations that seek NEA funding.

B. "Respect For The Diverse Beliefs And Values Of The American Public"

The meaning of the phrase "diverse beliefs and values of the American public" is as opaque as is "general standards of decency." Which particular set of beliefs and values is to

[5] Clapp, *supra* note 3, at 265, 323-25, 369.

serve as the standard for selection? Although the statute recognizes that the beliefs and values of the American public are "diverse," it fails to indicate which values should prevail if respecting one set of values means offending another. Who is to make this subjective judgment? Since Section 954(d)(1) designates the NEA's Chairperson as the final arbiter of what art conforms to the "decency" and "respect" provisions, does this mean that the Chairperson is empowered to reject any grant application that he or she believes criticizes or questions the political, religious, or moral values of some part of the American public?

"Respect for the diverse beliefs and values of the American public" is necessarily defined with reference to religion, politics, racial or ethnic attitudes, and attitudes about human sexuality, among other beliefs and values. Within each of these spheres, there is ample potential for discordant views and attitudes, depending upon the point of view of the person doing the evaluating.

Assuming that religion is included among the American beliefs and values that an arts grant must respect, it is quite possible that depicting religious figures or symbols in unconventional contexts or in unflattering postures may be considered indecent or disrespectful. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-05 (1952) ("In seeking to apply the broad and all-inclusive definition of 'sacrilegious' . . . the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies").

For example, Paolo Veronese's 1573 painting "Christ in the House of Levi" (App. 7a) now hanging in the Galleria dell'Accademia in Venice, was criticized by the religious tribunal of the Inquisition because it included figures—a dwarf, jesters, servants, and a dog—considered inappro-

priate alongside the Holy Figures.[6] Michelangelo's "Last Judgment" (App. 2a) (1534-41) was censored in part because of the nudity of the figures, a defect that Pope Paul IV finally cured in 1558 by having draperies and loincloths painted over the offending body parts;[7] and Caravaggio's "Death of the Virgin" (1605-06) (App. 8a), first commissioned as an altarpiece, was then rejected as blasphemous because the Virgin

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6 H.W. Janson and Anthony F. Janson, *History of Art* 494-95 (5th ed. rev. 1997). The painting was originally known as "The Last Supper." On July 17, 1573, Veronese was summoned by the Holy Office to be questioned before the Holy Tribunal, Paolo Caliari of Verona:

> . . . Q: Who are at the table of Our Lord?
>
> A: The Twelve Apostles.
>
> Q: What is St. Peter, the first one, doing?
>
> A: Carving the lamb in order to pass it to the other end of the table.
>
> Q: What is the Apostle next to him doing?
>
> A: He is holding a dish in order to receive what St. Peter will give him.
>
> Q: Tell us what the one next to this one is doing.
>
> A: He has a toothpick and cleans his teeth . . .
>
> Q: Did any one commission you to paint Germans, buffoons, and similar things in that picture?
>
> A: No, milords, but I received the commission to decorate the picture as I saw fit. It is large and, it seemed to me, it could hold many figures.
>
> Q: Are not the decorations which you painters are accustomed to add to paintings or pictures supposed to be suitable and proper to the subject and the principal figures or are they for pleasure—simply what comes to your imagination without any discretion or judiciousness?
>
> A: I paint pictures as well as I see fit and as well as my talent permits.

Id. at 634-65. To appease his critics, the artist consented to changing the title to "Christ in the House of Levi." *Id.* at 495.

7 Clapp, *supra* note 3, at 61. Moshe Carmilly-Weinberger, *Fear of Art: Censorship and Freedom of Expression in Art* 17-18 (1986).

figure in the picture was modeled after a prostitute and was bare-footed.[8]

Although it is easy to dismiss such attitudes as the unenlightened views of the 16th and 17th centuries, recent history shows that artists are not immune from those who consider blasphemous the use of religious symbols in artistic expression. For example, in 1928 George Grosz, a well-known German artist, and his publisher were prosecuted for depicting "Christ in a Gas Mask" (App. 9a).[9] In 1991, a "photo-allegory" by the artist Duane Michals drew criticism for depicting a crucifix, pointed gun-like at the head of a victim, to show the artist's belief that "no American has the right to impose his private morality on any other American" (App. 10a).[10] And Senator Jesse Helms used Andres Serrano's 1987 photograph "Piss Christ" (App. 11a) as a focal point in his attack on the NEA's 1989 appropriations.[11] If offending religious sensibilities is a criterion for denying NEA funds, such a rule might exclude Max Ernst's 1926 "The Holy Virgin Chastising the Infant Jesus Before Three Witnesses: Andre Breton, Paul Éluard and the Artist" (App. 12a) and Francis Bacon's 1953 "Study After Velasquez's Portrait of Pope Innocent X" (App. 13a), among countless other visual art works and works of literature, opera and theater.

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8 Pamela Askew, *Caravaggio's Death of the Virgin* 50-68 (1990); Helen Gardner, *Gardner's Art Through the Ages* 728 (1991).

9 Clapp, *supra* note 3, at 224-26.

10 Op-Ed, *Four Frames on America*, N.Y. Times, July 6, 1991, at A21; N.Y. Times, July 20, 1991, at A18 (Letters).

11 *See, e.g.*, 135 Cong. Rec. S 5595 (daily ed. May 18, 1989) ("Senator [D'Amato] is absolutely correct in his indignation and in his description of the blasphemy of the so-called artwork. I do not know Mr. Andres Serrano, and I hope never to meet him. Because he is not an artist, he is a jerk."); *id.* at S 12968 (Oct. 7, 1989) (criticizing the conference bill on the 1990 appropriations bill for its failure "to get tough on the NEA for funding trash like Mr. [Robert] Mapplethorpe's and Mr. Serrano's"). One of the immediate results of Senator Helms's attack was the legislation at issue here.

Whether a particular work of art will offend Americans' beliefs or values often depends on the perspective of the viewer. This is well illustrated by David Hammons's "How Ya Like Me Now" (1988) (App. 14a), which depicts a white, blue-eyed Jesse Jackson. The work outraged many young African-Americans, who saw it as insulting to Mr. Jackson, unaware that the African-American artist was using color to comment on how race influences political (and other) judgments.[12] Similarly, viewers offended by Robert Colescott's highly stereotypical images of African-Americans in "George Washington Carver Crossing the Delaware: Page From American History" (1975) (App. 15a) might react differently once they realize that Colescott, an African-American, seeks to attack such stereotypes with his figures.[13]

Differing political viewpoints can also influence the perception of whether a particular artistic work collides with "the beliefs and values of the American public." In the age of McCarthyism in the United States, artists, especially those of foreign origin, were often identified with communism. In 1949, Congressman George A. Dondero delivered the following lines in a speech before the House of Representatives:

> . . . art is considered a weapon of communism, and the Communist doctrinaire names the artist as a soldier of the revolution. It is a weapon in the hands of a soldier in the revolution against our form of government, and against any government or system other than communism. . . .

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12 Roxanne Roberts, *Jackson: Not Insulted by Painting; Says Destruction of Portrait Reflects Hidden Anger*, The Washington Post, Dec. 4, 1989, at B1; *Hammering the Body Politic; Blacks Wreck a Portrait of a Blond, White Jesse Jackson*, Time, Dec. 18, 1989, at 79.

13 *See* John Russell, *Turbulent Restatements from Robert Colescott*, N.Y. Times, Mar. 3, 1989, at C32; Paul Richard, *Robert Colescott's Perspectives on Black and White*, The Washington Post, January 20, 1988, at C1.

> What are these isms that are the very foundation of so-called modern art? . . . I call the roll of infamy without claim that my list is all-inclusive: dadaism, futurism, constructionism, suprematism, cubism, expressionism, surrealism, and abstractionism. All of these isms are of foreign origin, and truly should have no place in American art. . . . Picasso, who is also a dadaist, an abstractionist, or a surrealist, as unstable fancy dictates, is the hero of all the crackpots in so-called modern art.[14]

Most of the artists that Senator Dondero believed were conspiring to overthrow democracy in America (such as Marcel Duchamp and Fernand Léger), today are accepted, almost universally, as important contributors in the development of American art.

A more extreme example of artistic expression colliding with the reigning political regime was the Third Reich's program to brand as "degenerate" much of the modern art that flourished in Germany after World War I in order to clarify for the German public "exactly what type of modern art was unacceptable to the Reich, and thus 'un-German.' "[15] Confiscating art from museums all over Germany, the Nazis installed over 600 works in an exhibition of so-called "Degenerate Art." To discredit the works further for the popular audience, many of the works were affixed with a red sticker stating "Paid for by the taxes of the German working people."[16] The condemnation of contemporary art and the threat of eliminating public funding for the arts is still part of the agenda of some right-wing European politicians including Jean-Marie Le Pen in France and Jorg Haiden in Austria.[17]

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14 95 Cong. Rec. H 11584 (Aug. 16, 1949).

15 Stephanie Baron (ed.), *"Degenerate Art": The Fate of the Avant-Garde in Nazi Germany* 9-23, 45-46, 89 (1991).

16 *Id.*

17 *See* David Zane Mairowitz, *Fascism a la Mode: in France, the Far Right Presses for National Purity*, Harper's Magazine, Oct., 1997,

These examples demonstrate that the public's opinions as to whether any particular art work is "decent" will be as diverse as their beliefs and values in general. As should be apparent, there is no way to determine the content of "general standards of decency" and the "respect for the diverse beliefs and values of the American public." Because Section 954(d)(1) implicates protected speech under the First Amendment, those standards need to be defined with specificity. They are not. The statute, therefore, is unconstitutionally vague.

C. The "Decency" And "Respect" Provisions Cause The Harm That The Vagueness Doctrine Attempts To Avoid

The harm of the unconstitutionally vague "decency" and "respect" provisions is that authority to administer this vague statute is placed, with no form of review, in the panelists, Council, and ultimately, in one person, NEA's Chairperson, with knowledge that members of Congress and others with particular political viewpoints will be looking over their shoulders. This sort of unguided discretion fosters precisely the kind of invidious discrimination among viewpoints that is intended to be avoided by the Due Process Clause's requirement that a statute be reasonably clear. As Justice Clark pointed out, concurring in *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 701 (1959), with this sort of statutory guideline

> [t]he only limits on the censor's discretion is his understanding of what is included in the term "desirable, acceptable or proper." This is nothing less than a roving commission in which individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law.

at 59; Sharon Waxman, *Artists Put on Brakes at France's Right Turn; Some Urge Boycott in National Front Towns*, The Washington Post, June 22, 1995, at C1; Ian Traynor, *Austrian Far Right Turns the Arts into Theatre of War*, The Guardian (London), Dec. 14, 1995, at 15.

Accord, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423-24 n.19 (1993).

Moreover, the Chairperson is not required to give reason for disapproving a grant, so that there is no record that can be reviewed if the Chairperson abuses his or her authority and rejects an application because of its political or ideological viewpoint. Thus, the sole, unsupervised and unreviewable authority to decide whether a grant application comports with "general standards of decency" and is respectful of the American "beliefs and values" amounts to bestowing on the Chairperson a power of censorship, a power that this Court has said "should not be easily inferred." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151 (1946).[18]

Unjustified rejection of artistic expression because of its viewpoint is just one side of the harm flowing from this unconstitutionally vague statute. The other is the self-censoring effect that such a limitless standard will have on the artists and arts organizations who seek NEA grants to support their work and exhibitions. Artists producing works worthy of funding will be discouraged from applying for an NEA grant, fearing that any subject too unconventional will not overcome the hurdle of Section 954(d)(1)'s "decency" and "respect" provisions. A second level of self-censorship comes from arts institutions that decline to display works out of fear of being rejected for future funding under some interpretation of the "decency" and "respect" provisions. Section 954(d)(1) thus has the doubly undesirable effect of forcing artists and arts organizations to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked" (*Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotes omitted)), and stifling the creation of the best and most inno-

[18] In *Hannegan*, this Court held that to uphold the Postmaster General's revocation of Esquire Magazine's second-class postal permit on the ground that, although not obscene, material in the magazine was "indecent, vulgar and risque" "would grant the Postmaster General a power of censorship [which is] abhorrent to our traditions. . . ." 327 U.S. at 149, 151.

vative work that artists are capable of creating—just what the NEA was originally established to promote.

II

ARTISTIC "EXCELLENCE" AND "MERIT" ARE NOT UNCONSTITUTIONALLY VAGUE

In support of its contention that Section 954(d)(1) is not vague, the NEA has adopted an argument advanced by Judge Kleinfeld in his dissent from the court of appeals panel decision (Pet. App. 38a-40a) and repeated by Judge O'Scannlain in his dissent from the denial of the petition for rehearing *en banc* (Pet. App. 95a). The NEA claims that if "general standards of decency" and "respect for the diverse beliefs and values of the American public" are impermissibly vague, then so too are "artistic excellence" and "artistic merit." Pet. Br. 48.

The court of appeals rejected Judge Kleinfeld's argument as irrelevant because the meaning of those terms had not been challenged by respondents. Pet. App. 18a n.18. However, the court of appeals noted that there were obvious differences between the "decency" and "respect" provisions and "artistic excellence" and "artistic merit," including the fact that the NEA decision-makers are knowledgeable about the arts, but have no particular expertise in determining what is "decent" or whether the American public shares any particular beliefs or values on a given subject. *Id.*

The NEA's argument that "artistic excellence" and "artistic merit" are unconstitutionally vague suggests that it is impossible to answer the questions "what is art?" and "how do we tell the difference between good art and bad art?" The *amici curiae* believe that, although there may be no absolutes when it comes to art, there are, in fact, standards and tools which can be used to answer these questions.[19]

[19] Some philosophers of art and aesthetics, for example, have recognized that visual art is the marriage of (1) content and (2) a mode of visual presentation. *See, e.g.*, G.W.F. Hegel, *Introductory Lectures on Aesthetics* 13 (Michael Inwood ed. & Bernard Bosanquet trans., Penguin Books 1993) ("What is now aroused in us by works of art is over and above our immediate enjoyment, and together with it, our judgment; inasmuch as we subject the content and the means of representation of the work of art and the suitability and the unsuitability of the two to our intellectual consideration."); Arthur C. Danto, *After the End of Art: Contemporary Art and the Pale of History* 81-98 (1997) (applying Hegel's paradigm to contemporary art criticism).

In his dissenting opinion, Judge Kleinfeld tries to suggest that the process of judging art is wholly elusive. Pet. App. 39a. He relies for this startling proposition on a passage in the 1962 first edition of "History of Art," the well known textbook by H.W. Janson.[20] A closer examination, however, reveals that Janson does not support Judge Kleinfeld's assertion. Although Janson admits that absolute definitions cannot be reached, the Introduction to his first edition discusses at least two factors which are necessary to distinguish art from mere craft: originality and creativity.[21] By the 1997 fifth edition of the Janson text, the Introduction has been expanded to include discussions of creativity, imagination, originality, technique, meaning and style, self-expression, and taste.[22] That Introduction continues by listing certain visual elements that should be analyzed when looking at art: line, color, light, composition, form and space. Contrary to Judge Kleinfeld's assertion that there are no standards for evaluating art, the latest edition of Janson takes a far less absolutist view: "If definitive conclusions are impossible, there is still a good deal that can be said."[23] Indeed, Janson's "History of Art" is

[20] Pet. App. 39a. The exact passage is: "But if we must give up any hope of a trustworthy rating scale for artistic quality, can we not at least expect to find a reliable, objective way to tell art from non-art? Unfortunately, even this rather more modest goal proves so difficult as to be almost beyond our powers."

[21] H.W. Janson, *History of Art* 9-17 (1st ed. 1962).

[22] Janson, *supra* note 6, at 16-25.

[23] *Id.* at 16.

a 1000-page tome of judgments about which objects are the visual artistic masterpieces of the Western World.

The factors listed in Janson's most recent Introduction demonstrate that there are, in fact, standards which may be used to determine artistic excellence and merit. Furthermore, and central to this case, whatever artistic "excellence" and "merit" mean, their definition cannot and do not include "general standards of decency" and the "respect for the diverse beliefs and values of the American public."

A. There Are Established Standards Of "Artistic Excellence" And "Artistic Merit"

Since the advent of art history as a discipline, there have been established standards for determining artistic excellence. However, the answers to the questions "what is art?" and "how can we tell the difference between good art and bad art?" have depended on where and when they are asked.

In ancient Greece and Rome, writers mentioned objects that today are classified as art, such as paintings and sculptures, but they were not discussed as works of art. Instead, these mentions appeared in texts on other subjects and described only how the objects were made, their size, their cost, the artists who made them, how lifelike they were, whether they were the first of their kind, and the extent to which they embodied either natural or ideal beauty.[24] Cicero (106-44 B.C.), Pliny (23-79 A.D.) and Quintillian (30-100 A.D.), for example, described the development of sculpture beginning from the 5th century B.C., moving from crude early representations to a style of perfect naturalism (the way things really look) in the 4th century B.C. (evidenced by the sculptural work of Phidias on the Parthenon), to idealism (the way things ought to look in a perfect

[24] Eric Fernie, "A History of Methods," *Art History and Its Methods: A Critical Anthology* 10 (1995). *See* Pliny the Elder, *Natural History*, excerpts *reprinted in* Janson, *supra* note 6, at 213-14.

world).[25] These ways of writing about art objects continued, for the most part without change, from antiquity, throughout the first millennium and up to the Middle Ages.[26]

The study of art became a subject in its own right in the 16th century with the publication of Giorgio Vasari's *Lives of Artists* in 1550 in Florence.[27] The *Lives* is a series of biographies which treat the Renaissance artist as genius, set apart from ordinary man by the grace of God. The *Lives* featured artists such as Leonardo da Vinci, Michelangelo and Raphael; and their achievements in painting, sculpture and architecture were compared to the classics of ancient Greece and Rome. Unlike prior historians, Vasari did not merely describe art works; instead, he made judgments about the quality of art works for the purposes of attribution and to decide which artists belonged among the most accomplished of the Renaissance.[28] Vasari assessed artistic quality on the degree of naturalism or illusion attained and considered ideal beauty to be the selection and combination of the most beautiful parts of nature. He encouraged connoissuership and the close study and analysis of works of art, leading to the classification of styles of individual artists and schools, and tracing the influences among them.[29]

Following the peak of the Renaissance style (generally considered from 1500 to 1525), the history of Western art is best characterized by a series of stylistic innovations and reactionary movements, labeled by historians with such terms as the Baroque, Rococo, Neo-Classical and Romantic periods. Not surprisingly, these movements in painting and sculpture

[25] Fernie, *supra* note 24, at 10.

[26] *Id.*

[27] 1 Giorgio Vasari, *Lives of the Artists* (George Bull trans., Penguin Books 1965). *See* Fernie, *supra* note 24, at 22-28.

[28] Vasari, *supra* note 27, at 83-84 ("I have endeavored not only to record what the artists have done but also to distinguish between the good, the better, and the best . . .").

[29] *See* Fernie, *supra* note 24, at 22-28; Janson, *supra* note 6, at 452.

had companion periods in music and literature. At first, each of these movements presented, in some way, a challenge to the then-established style of art. They subsequently became popular and, therefore, established in their own right, and, eventually, declined as they were challenged by a new style or the revival of an old style.

The Renaissance "classical" style of Leonardo da Vinci, Michelangelo and Raphael can best be characterized by clarity, balance and restraint. By the mid to late 16th century, many artists began moving away from this classical style and developed a style that had more of a mannered elegance.[30] This break led to the rise and dominance in the 17th century of the Baroque artists (such as Caravaggio and Bernini in Italy, and Rubens, Rembrandt and Vermeer in Northern Europe), whose painting and sculpture were generally characterized by great drama or elaborate ornamentation.

Despite the work of these Italian and Northern artists, it was France that became the most culturally (and militarily) powerful European country in the 17th century (a reign that, in the visual arts, would continue until the middle of the 20th century). In response to the dramatic works of the Baroque painters, many French artists began once again to champion the classical style. The Frenchman Nicholas Poussin (1593-1665) was the protagonist of the classical style in the 17th century. He wrote that the painter must:

> make every effort to avoid getting lost in minute detail, so as not to detract from the dignity of the story. He should describe the magnificent and great details with a bold brush and disregard anything that is vulgar and of little substance. Thus the painter should not only be skilled in formulating his subject matter, but wise enough to know it well and to choose something

[30] The "Mannerist" style is represented by the Italian painters Pontormo (1494-1556), Parmigianino (1503-1540), and Bronzino (1503-1572). *See generally* Janson, *supra* note 6, at 482-496.

> that lends itself naturally to embellishment and perfection.[31]

Following Poussin's death, the French government, under Louis XIV (crowned in 1661), adopted classicism as the officially approved style in order to glorify the monarchy.[32] Louis XIV also reconstituted the Royal Academy of Painting and Sculpture in Paris to inculcate this style. The Academy even devised a method for grading artists of the past and present in such categories as drawing, expression and proportion. (The ancient Greeks and Romans received the highest grades, followed by Raphael and Poussin. The Venetians, such as Veronese, and the Dutch received the lowest marks.)[33]

In England, Sir Joshua Reynolds, the president of the Royal Academy in London, also professed the Academy style. In his famous *Discourses*, Reynolds developed a hierarchy for artistic merit in painting based on subject matter and style that was similar to the rules of the French Academy.[34] Paintings of subjects from Greek and Roman mythology and history and the Bible were considered to be more dignified than paintings of landscapes, which, in turn, were considered more advanced and noble than portraits and still life paintings.[35]

Following Louis XIV's death in 1715, the French nobility were no longer tethered to the court at Versailles, and the monarchy loosened its grip on the French Academy. In this freer society, artistic taste swung in the other direction toward the highly fashionable style of the Rococo painters such as Antoine Watteau, Francois Boucher and Jean-Honoré Frago-

[31] Nicholas Poussin, from an undated manuscript, *reprinted in* Janson, *supra* note 6, at 641.

[32] *See* Janson, *supra* note 6, at 600-01.

[33] *Id.* at 601.

[34] Sir Joshua Reynolds, *Discourses on Art*, ed. Robert R. Wark, 57-73 (1975).

[35] *Id.* Given Reynolds's theories, it is surprising that he was, in fact, primarily a painter of portraits.

nard. Instead of choosing noble and dignified subjects from Greek and Roman mythology or the Bible, these painters showed scenes of elegant society, generally in parklike settings, and comedies.[36]

The Rococo period lasted only a short time, however, as the politics of the French Revolution and Empire greatly influenced the favored artists of the late 18th and early 19th century. A revival of classical antiquity (the "Neo-Classical" period) dominated the late 18th century (*e.g.*, the painting of Jacques-Louis David, a hero of the French Revolution), and was linked to the Enlightenment thinkers in France, England and Germany. Then, around 1800, the Romantic artists (as well as writers and musicians) began to flourish.[37] These artists were more linked to each other in thought (generally a "return to Nature") than in style, which was really a revival of many different styles (*e.g.* the "Neo-Rococo" of Francisco Goya in Spain, the "Neo-Baroque" of Théodore Géricault and Eugène Delacroix in France, the "Neo-Classicism" of J.A.D. Ingres also in France, and the landscape painters of France and England including Camille Corot, Jean-Francois-Millet, John Constable and J.M.W. Turner).

Toward the end of the 19th century, at the dawn of the Industrial Age, a revolutionary development in painting took place in France. In 1863 Édouard Manet (1832-1883) shocked the Paris art world with his "Déjeuner sur l'herbe" (App. 4a). This painting particularly offended contemporary morality by juxtaposing a nude woman with two men in contemporary dress in an outdoor setting, without a title that invoked any "higher" meaning.[38] More importantly, however, the painting

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36 *See generally* Janson, *supra* note 6, at 610-629.

37 *See generally*, Janson, *supra* note 6, at 672-706; Robert Rosenblum and H.W. Janson, *19th Century Art* 114-218 (1984).

38 *See* Janson, *supra* note 6, at 720; *see also* T.J. Clark, *The Painting of Modern Life: Paris in the Art of Manet and His Followers* 94-95 (1984).

is among the first to use pictorial elements purely for aesthetic effect, thereby demonstrating that painting does not have to be a window to the world. Manet took this concept even further by painting his later pictures with very little modeling, depth or shadows, thus rejecting the notion that a painting must transform a flat surface into a pictorial space.[39]

Manet's style of painting was adopted and advanced by Claude Monet and the Impressionist painters, including Camille Pissarro, Auguste Renoir and Edgar Degas.[40] When these artists were refused permission to exhibit at the Salon of Paris, they were forced to organize an exhibition of their own works in the spring of 1874.[41] Their paintings depicted outdoor, "slice-of-life" scenes using innovative networks of color and seemingly spontaneous brush strokes. Painters such as Paul Cézanne carried Impressionism even further by painting still-life subjects (bowls of apples, for instance) using brush strokes that resulted in highly textured canvasses and perspectives that could not exist in the real world.[42]

Just as there were standards for judging art in the 16th through 19th centuries, there are also standards for judging 20th century art. However, judging artistic excellence in the 20th century is more complex than in the past because of the tremendous variety of artistic styles and movements.[43] Not only have new and previously unimagined styles of painting and sculpture emerged in the 20th century, entirely new *forms* of art have been developed. This tradition was begun around 1913 when Marcel Duchamp began to display ordinary objects such as bicycle wheels, shovels and, in one case, a

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39 Rosenblum and Janson, *supra* note 37, at 278-295.

40 *See generally id.* at 331-53.

41 *Id.* at 331-54.

42 *See generally id.* at 384-93.

43 As various styles and movements have developed, so too have the number of "isms" that historians use to label them. Examples include: Cubism (*e.g.*, Picasso and Braque), Futurism (*e.g.*, Umberto Boccioni),

urinal, as "ready made" sculptures.[44] Duchamp's intent in presenting such objects, without altering them at all, was to give them different meaning by placing them in a new context, an art gallery, in order to challenge the idea that aesthetics were necessary for art and to expand the notion of the artist as creator. Duchamp's views were carried forward in the 1960s by the Pop Artists (*e.g.* Claes Oldenburg, Roy Lichtenstein and Andy Warhol) who displayed ordinary objects as art works to expose art as a commodity and to comment on the new commercial nature of the art world.[45] Since Duchamp's time, unconventional objects such as air, light, sound, words, live persons, animals and food have all been used as components of art works. In addition, photography, video, installations, performances ("happenings"), environmental constructions ("earth art"), assemblages, and mere ideas have become legitimate art forms.

These are fascinating, exciting and challenging times for artists, art historians and critics. Artists are choosing new and controversial subjects for their art as well as presenting new forms and technologies to embody those subjects. It is a time when the audience may have just as much responsibility for the understanding of an art work as the artist has in conveying its meaning; a time when sensory experience, traditionally thought to be paramount in the appreciation of the visual arts, may be subordinate to thought; a time when art does not even require a tangible object.[46]

Surrealism (*e.g.*, Renè Magritte, Joan Miró, and Salvador Dalí), Dadaism (*e.g.*, Marcel Duchamp), Suprematism (*e.g.*, Kazimir Malevich), Expressionism (*e.g.*, Franz Marc, Max Ernst, and Egon Schiele), Abstract Expressionism (*e.g.*, Jackson Pollock and Willem de Kooning) and Minimalism (*e.g.*, Sol LeWitt, Donald Judd and Ellsworth Kelly).

[44] *See* H.H. Arnason, *History of Modern Art* 227-230 (3d. ed. 1986).

[45] *See generally, id.* at 452-470; Janson, *supra* note 6, at 831-834; Michael Archer, *Art Since 1960* 9-25 (1997).

[46] Because art created in the last twenty-five years has gone so far beyond traditional notions of painting and sculpture, some art critics have argued that the history of art ended in the 1960s and that art created since that time is "beyond the pale of history." *See* Arthur C. Danto, *After the End of Art: Contemporary Art and the Pale of History* (1997); Hans Belting, *The End of the History of Art* (Christopher S. Wood trans. 1987).

Despite the changed nature of art in the 20th century, there remain standards for determining artistic excellence. Creativity, imagination, originality, technique, meaning, style, and self-expression are all still relevant. However, it requires skilled, knowledgeable and fair evaluators to apply these standards.

B. "Artistic Excellence" And "Artistic Merit" Must Be Evaluated Within The Particular Context Of The NEA Program

For the purposes of the void-for-vagueness doctrine of the Fifth Amendment, statutory language must be interpreted in the "particular context" within which the legislation was enacted. *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950)). The "particular context" within which "artistic excellence" and "artistic merit," as used in Section 954(d)(1), must be evaluated for vagueness purposes is the NEA grant program. It is the NEA decision-makers, after all, who must apply those standards. Because these decision-makers are knowledgeable about the arts (indeed, many are experts in their fields), "artistic excellence" and "artistic merit" are concepts with which they are extremely familiar.

In order to arrive at a meaningful evaluation of art, especially 20th century art, the evaluator must have knowledge about the objects at which he or she is looking. The more knowledge, the better. Important information to the evaluator may include the identity of the artist, his or her background, knowledge of prior works done by that artist, and the locale in which the work was created. In addition, he or she must be able to place the object within its art historical context. Is the work influenced by a prior artist? Are there literary or musi-

cal influences? Is the work making a statement about the history of art, as Duchamp's works were? Finally, and perhaps most importantly, the evaluator must be able to learn about the art work by closely looking at it. The ability to learn about an object by looking can come only with experience.[47] If the judge is a person who has examined hundreds or thousands of the same type of object, the evaluation becomes much more advanced and reliable. For example, an expert in ancient Greek painted ceramic pots could probably, without much controversy, examine two such pots and explain why one has more artistic merit than the other. This same is true, of course, in judging literature, music and performing arts.

Evaluating the art created by one's contemporaries is usually more difficult than evaluating art of the past. The problem is lack of perspective.[48] As with the writing of any history, a certain period of time needs to pass before any particular event can properly be put into context. Despite these

[47] The art critic Clement Greenberg wrote in 1961: "Experience itself—and experience is the only court of appeal in art—has shown that there is both bad and good in abstract art. And it has also been revealed that the good in one kind of art is always, at bottom, more like the good in all other kinds of art than it is like the bad in its own kind." Clement Greenberg, "The Identity of Art," 4 *The Collected Essays and Criticism* 118 (John O'Brian ed. 1993).

[48] For example, as popular as their style is today and as innocuous as their works now seem, the Impressionist painters were at first rejected by critics. In fact, their first exhibition in 1874 was received with outrage and condemnation. The critic Louis Leroy mockingly commented that viewers might have thought their eyeglasses were dirty by looking at all of the specks in one Pissarro painting. Rosenblum and Janson, *supra* note 37, at 334. In 1875, a public scandal arose after an exhibition in London of paintings by J.A.M. Whistler, including the painting "Nocturne in Black and Gold: The Falling Rocket" (App. 16a). The critic John Ruskin accused Whistler of asking "two hundred guineas for flinging a pot of paint in the public's face." *Id.* at 363. Forced to defend his reputation and his belief in the artist's freedom to create beauty by his own standards, Whistler sued Ruskin for libel and won after a trial in which many British artists testified about whether the painting was a legitimate work of art. *Id.*

complexities, there are experts in the various arts who are equipped with the knowledge, skill and experience to make valid evaluations of art works. Congress recognized that it would require the talent of these experts to make the determinations necessary to award NEA funds. The Act requires that funding applications be reviewed by advisory panels composed of artists and "lay individuals who are knowledgeable about the arts." 20 U.S.C. § 959(c)(2). Recommendations of the advisory panels are reviewed by the National Council of the Arts, which is composed of people selected "from among the private citizens of the United States who (A) are widely recognized for their broad knowledge of, or expertise in, or for their profound interest in, the arts and (B) have established records of distinguished service, or achieved eminence, in the arts." 20 U.S.C. § 955(b). In practice, the NEA advisory panels and the National Council are comprised of just such experts, skilled at discerning the best works among those submitted for NEA funding.

Thus, within the "particular context" (*Grayned*, 408 U.S. at 112) of government funding of arts programs, "artistic excellence" and "artistic merit" are not unconstitutionally vague. Although lay people with only passing knowledge of the arts cannot make an informed decision regarding an NEA grant award, these are not the people Congress selected to be the decision-makers for NEA grants. Instead, the NEA peer panelists and the NEA Council members, people with a broad understanding of the history of their particular artistic discipline and knowledgeable in the recent developments in the art or literary world, make the judgments regarding the applicants for NEA funding.[49] They are not well-versed in "standards of decency" and "the diverse beliefs and values of the American public," but they are uniquely qualified to evaluate artistic excellence.

[49] Despite the addition of more lay people to the NEA advisory panels and the addition of members of Congress to the National Council of the Arts, the panels are still made up primarily of experts in the arts.

C. "Artistic Excellence" And "Artistic Merit" Do Not Include "Standards Of Decency" And "Respect For The Diverse Beliefs And Values Of The American Public"

Throughout history, artists have traditionally experimented with what is new and unconventional, and artistic work often compels the viewer to look at the world in new, often troubling, and provocative ways. Given that tradition, a standard for judging artistic merit that focuses upon "general standards of decency"—and implicitly the idea of conformity—is fundamentally antithetical to the making of art. This is especially true in the 20th century when almost every major art movement is a rejection of the perceived established order in the art world or society.

Even if "general standards of decency" and the "beliefs and values of the American public" could be defined with some degree of accuracy, imposing those standards on NEA's selection of works showing artistic excellence and merit would have a devastating effect on the creation of art. Such standards would oblige artists to compromise their creativity and originality in order to conform to the viewpoint of the majority. This result was clearly not intended by Congress when it created the NEA in 1965. The Senate Report on the legislation creating the NEA stated:

> It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression. . . . Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age.
>
> Therefore, the committee affirms that the intent of this act should be the encouragement of free inquiry and expression. . . . [C]onforming for its own sake is not to be encouraged, and . . . no undue preference should be given to any particular style or thought of expression.[50]

The NEA suggests that "artistic excellence" and "artistic merit" refer only to "technical proficiency," and that the "decency" provision serves to expand those standards. Pet. Br. 42-43. This equation of artistic excellence with technical skill grossly simplifies the definition of artistic merit and ignores entirely the roles of creativity, imagination, originality and meaning in art. For it is the relationship between the mode of representation (the "technical proficiency") and the meaning of a work that raises an object from mere craft to the level of art.[51] By imposing standards that are impossible to define and reducing the universe of possibilities, the "decency" and "respect" provisions necessarily infringe on artists' ability to choose the most effective mode of representation for their art and to give their art work meaning. Far from expanding standards of "artistic excellence" and "artistic merit," the "decency" and "respect" provisions detract from them.

Imagine the results if Americans were polled on their "standards of decency" and their "beliefs and values."[52] Even if a

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50 S. Rep. No. 89-300, at 3-4 (1965).

51 See texts cited at *supra* note 19.

52 The results of such a poll might resemble the results of the poll conducted by the artists Vitaly Komar and Alexander Melamid to create "America's Most Wanted Painting" (App. 17a). *See Painting By Numbers: Komar and Melamid's Scientific Guide to Art*, ed. Joann Wypijewski (1997). Komar and Melamid sought to learn through a scientific study what the American people wanted if they could construct a painting. They polled 1001 persons, asking them what kind of paintings they liked and what features, colors, textures, etc. they wanted to see in painting. The survey showed that Americans' favorite color is blue (44%), and that they wanted "realistic-looking" paintings (60%), dishwasher-sized (67%), wild animals (51%) in their natural setting (89%), both ordinary and famous people, visible brush strokes (53%), blended colors (68%), etc. The artists took the survey results and painted "America's Most Wanted Painting", a landscape with mountains, a lake and blue sky, a posed George Wash-

consensus could be reached (what would the questions be?), the majoritarian view on various topics, if implemented, would chill the creation of art. In order to be eligible for an NEA grant, artists would be compelled to make art works that satisfied some notion of political correctness, instead of, simply, the best art they can create. To the extent that such vague statutory language as the "decency" and "respect" provisions mean anything, they imply a standard of that which is accepted, traditional and orthodox. To use such a benchmark to evaluate art that is intended to provoke viewers and to challenge traditional standards amounts to setting a standard that can never be met. As a standard for receiving NEA grants, this may be a prescription for the death of art funded by the NEA. While some members of Congress may intend that result, they should not be permitted to achieve it under the guise of an unconstitutionally vague statute.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 6, 1998

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ington figure, a hippopotamus, deer frolicking through the lake, and a group of people walking. It is easy to see that very few Americans would actually want "America's Most Wanted Painting." Although its individual aspects may be desirable, the sum of its parts is much less desirable. *Id.*

APPENDIX

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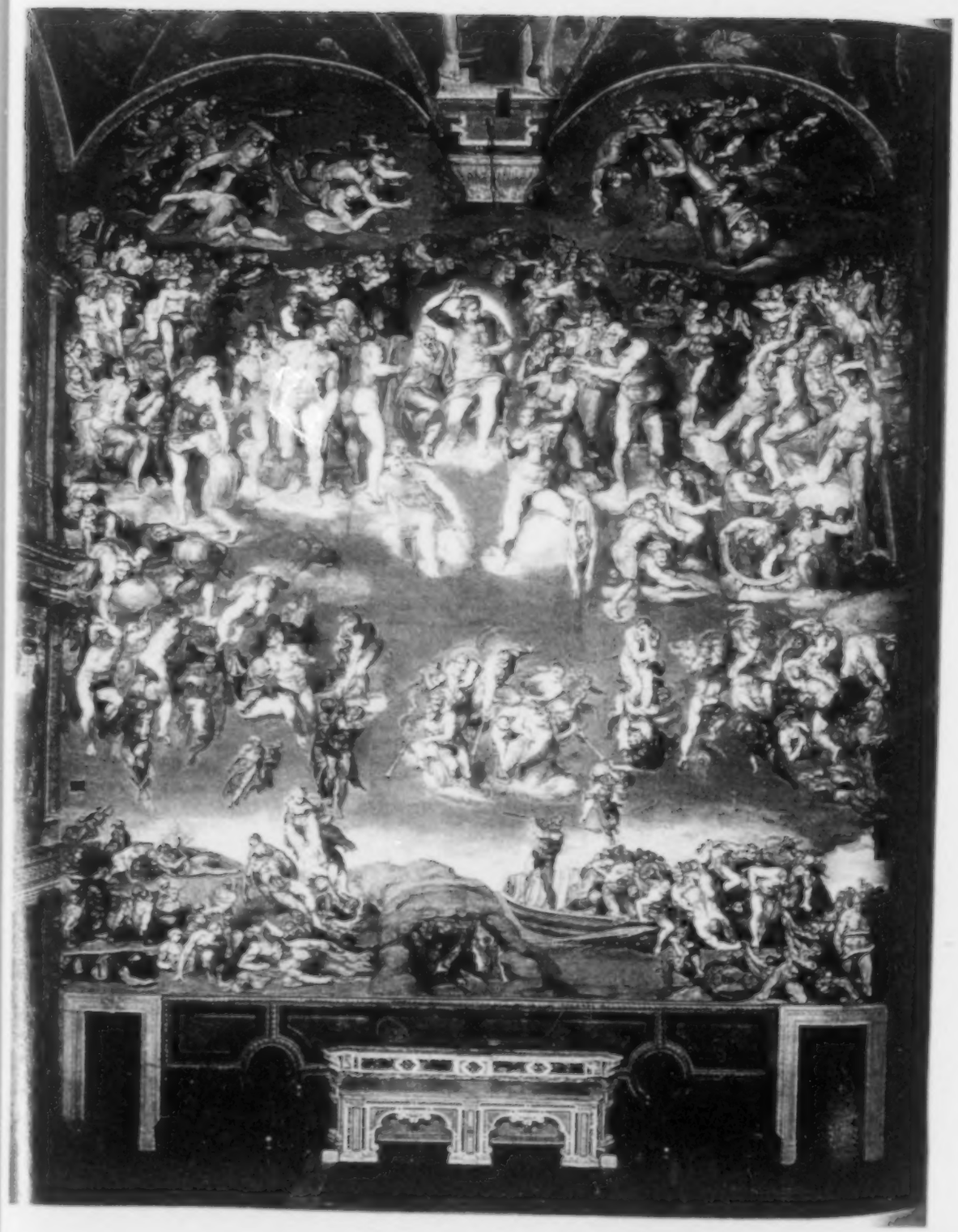

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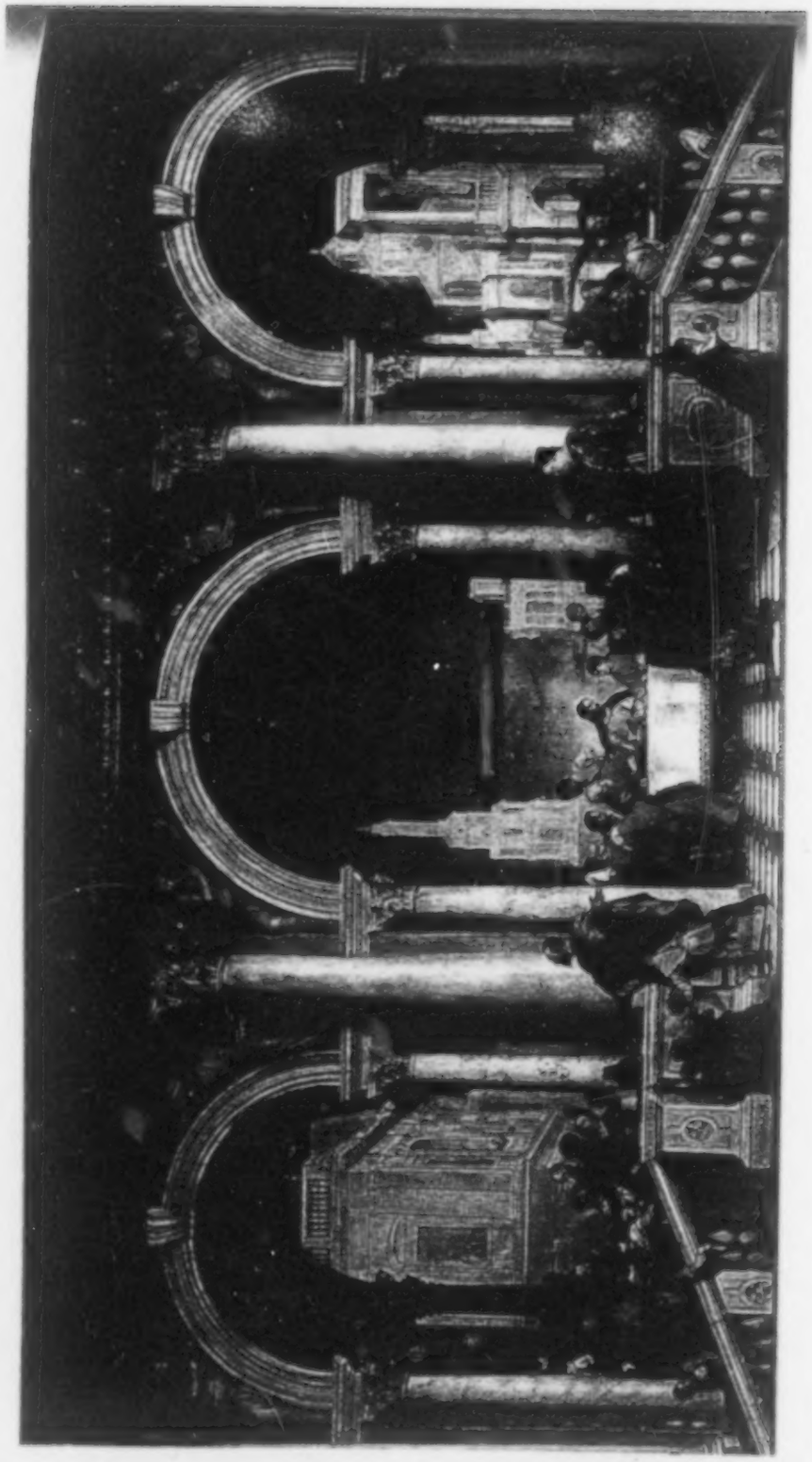

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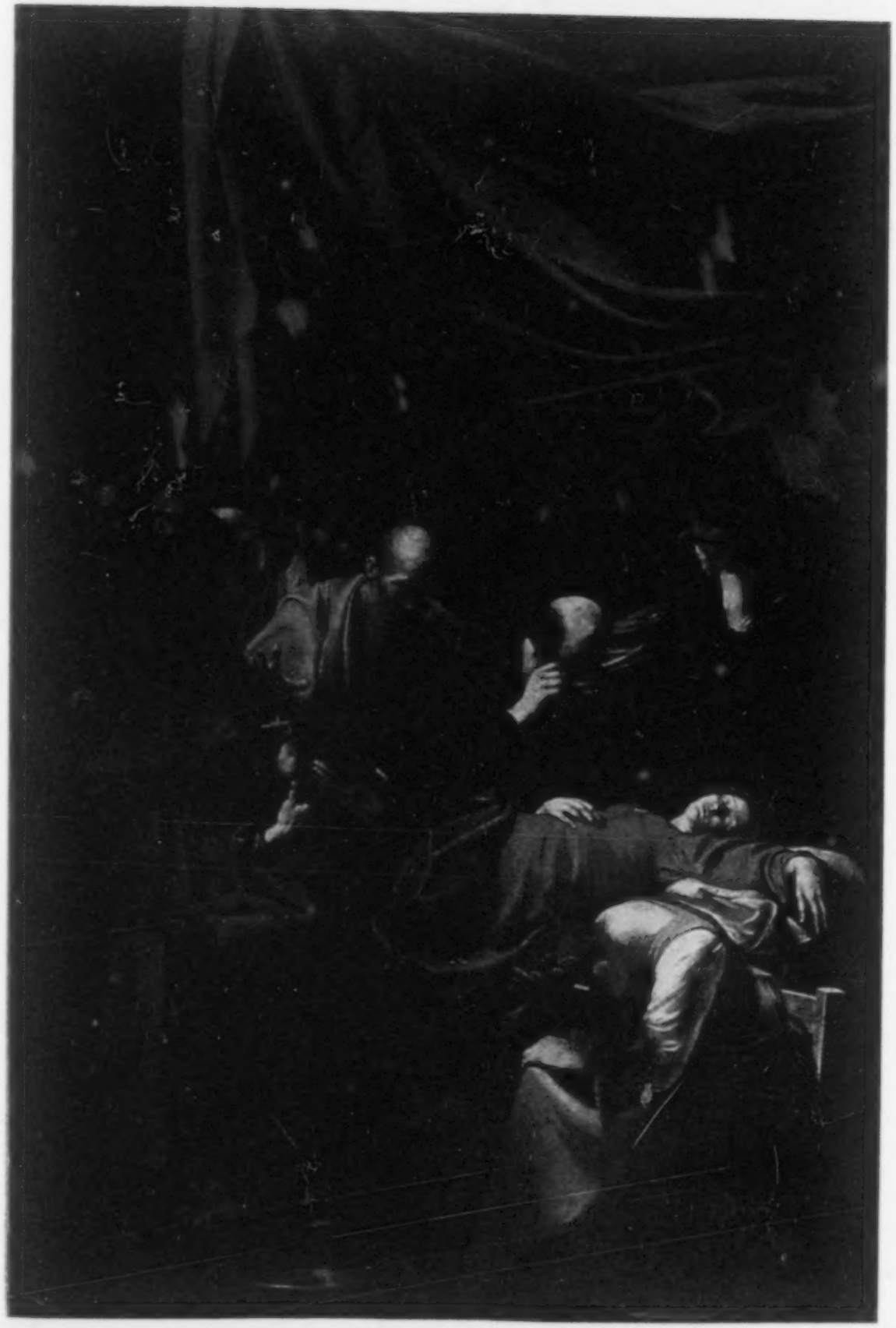

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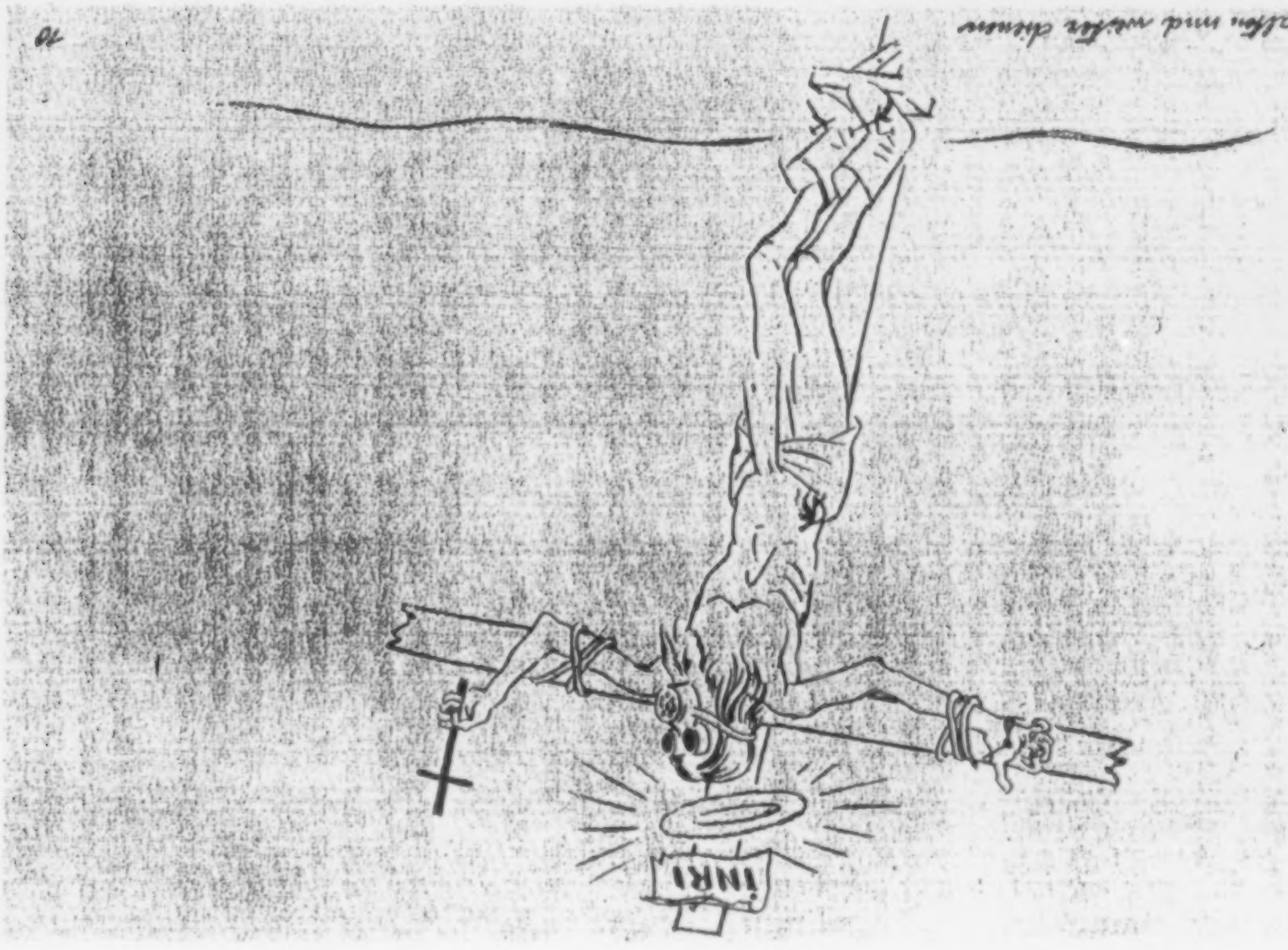

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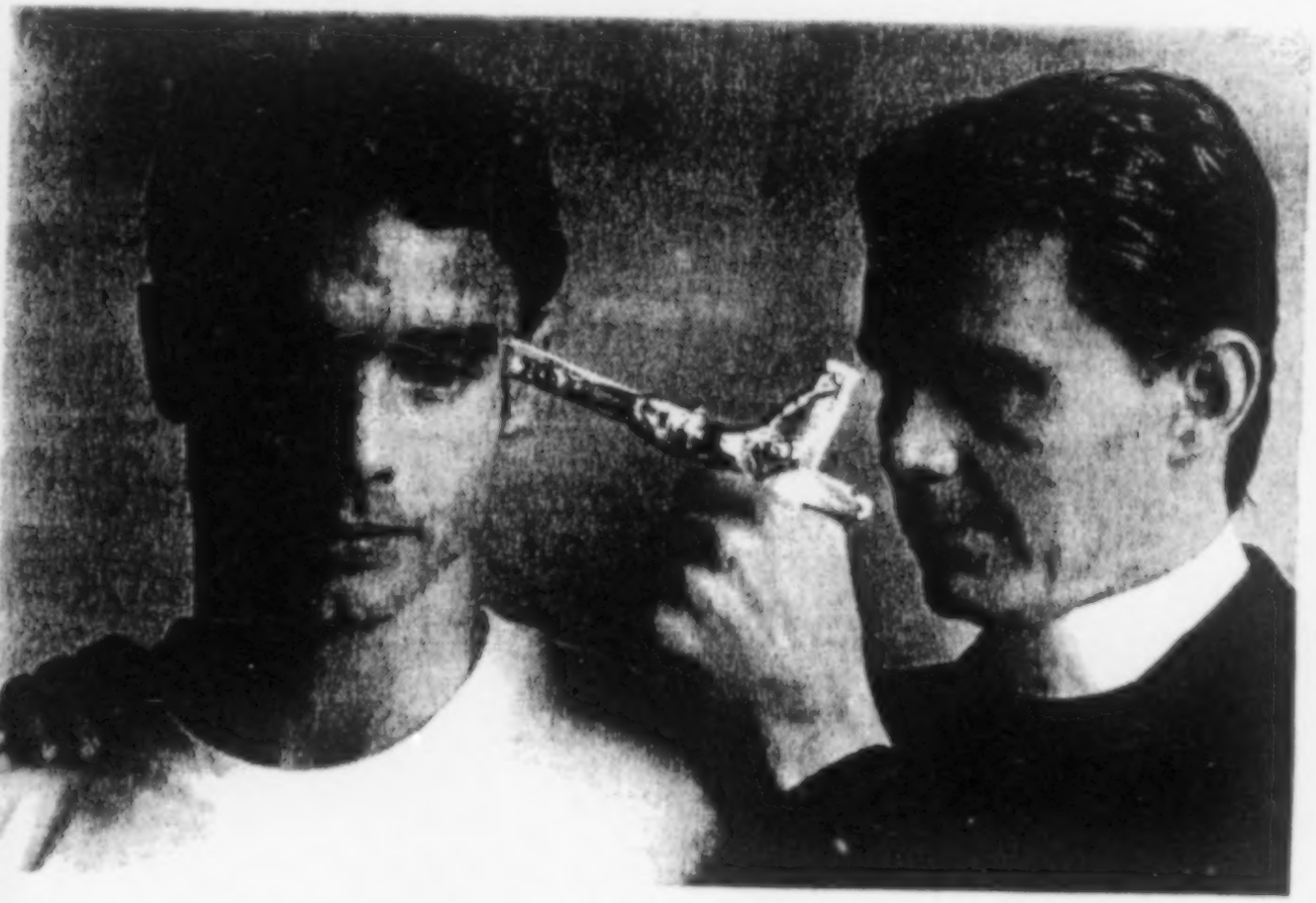
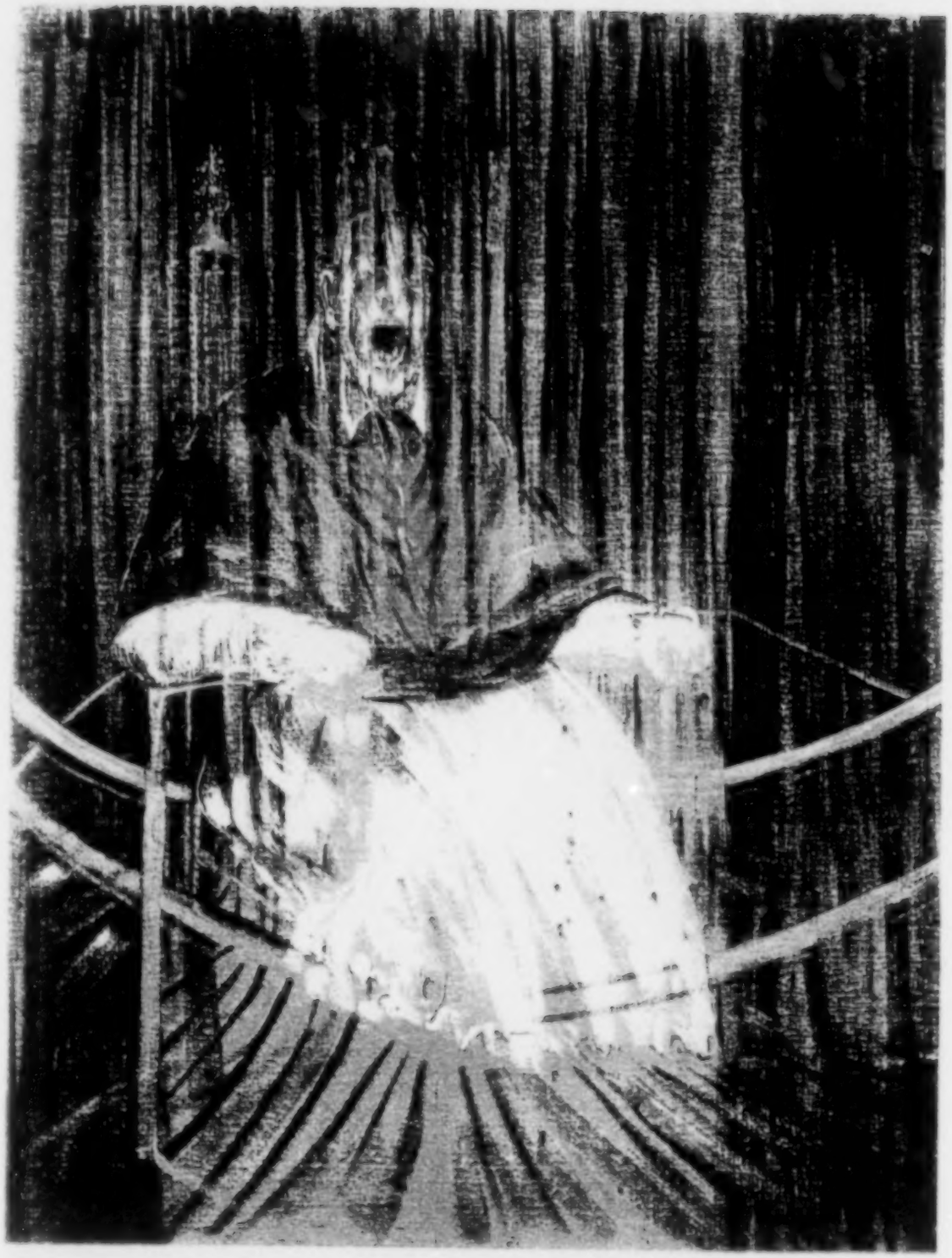


This photo allegory reflects my anger at coercive behavior by some of my fellow citizens. No American has the right to impose his private morality on any other American, yet this is precisely the political agenda of some religious groups.

Millions of women have become victims of attacks on their most painful, private choice of conscience: whether to have an abortion.

Millions of homosexuals and lesbians have become victims of attacks on gay rights legislation, denying them fundamental rights to housing and employment, which heterosexual Americans take for granted.

— Duane Michals



How You LIKE
ME NOW?

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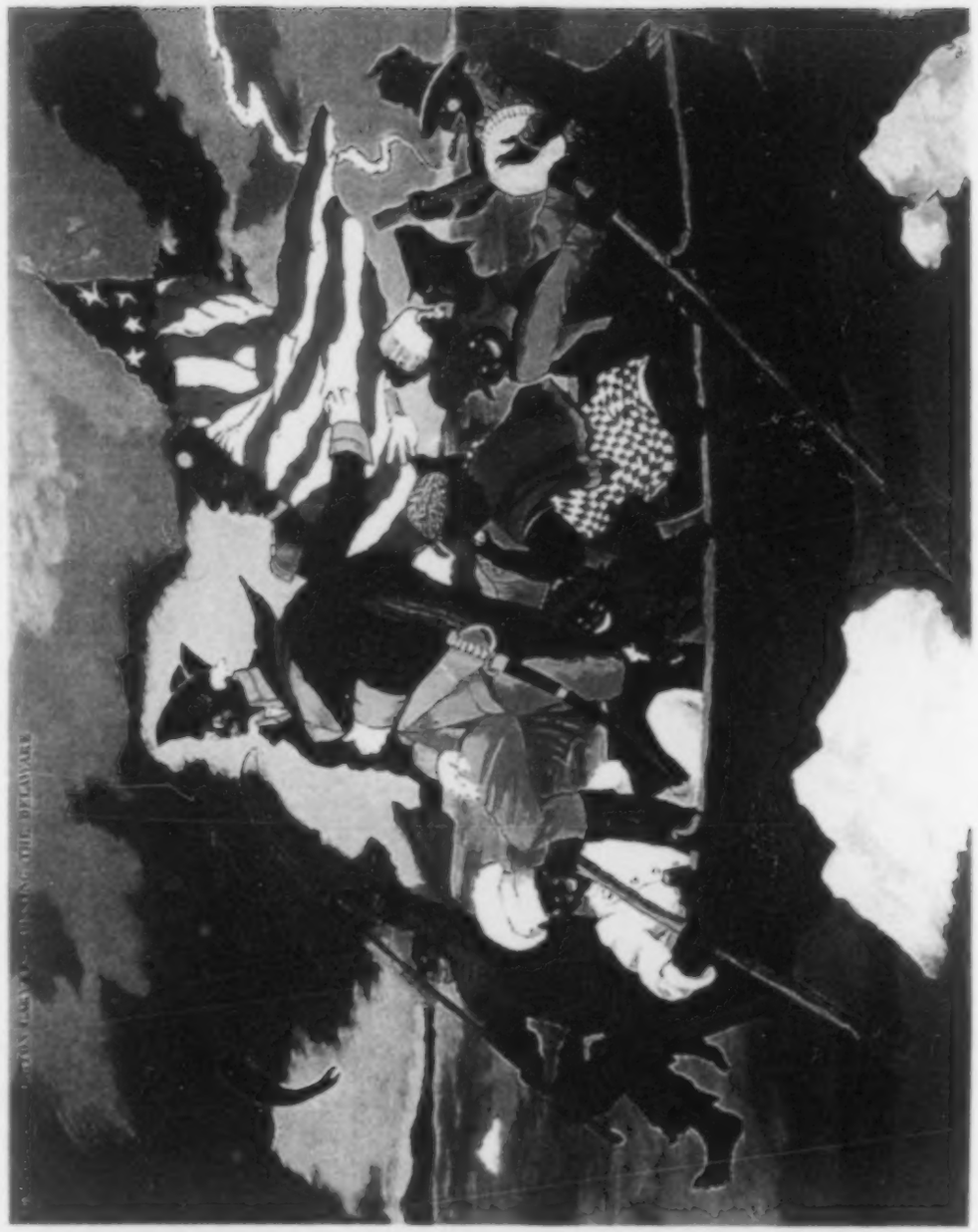

AMICUS CURIAE

BRIEF

MOTION FILED
FEB 6 1998

No. 97-371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS; JANE ALEXANDER, IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS,

Petitioners,

v.

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES; TIM MILLER; NATIONAL ASSOCIATION FOR ARTIST' ORGANIZATIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE FAMILY RESEARCH INSTITUTE OF WISCONSIN IN SUPPORT OF RESPONDENTS

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BEST AVAILABLE COPY

Case No. 97-371

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
1997 Term

National Endowment for the Arts; Jane Alexander, in her official capacity as Chairperson of the National Endowment for the Arts,

Petitioners,

v.

Karen Finley; John Fleck; Holly Hughes; Tim Miller; National Association of Artists' Organizations,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Now comes Family Research Institute of Wisconsin (FRI) and seeks leave to file this brief as Amicus Curiae. As grounds therefore, FRI would show that:

1. The Office of the Solicitor General of the United States has granted permission for FRI to file this brief, which letter is made a part of this motion;

2. Counsel for Respondents have denied permission for FRI to file this brief on the ground that FRI's interests are not aligned with theirs, which letter is made part of this motion;

3. FRI's interests are sufficiently aligned with those of Respondents that their denial of permission to bring this brief to the Court's attention ought not bar its filing.

Respondents seek the broadest flow of speech and other expressive conduct consistent with the parameters of the First Amendment. To that end, they challenged part of the NEA's enabling legislation as a content-based restriction on their right to free speech. Both the District Court for the Central District of California and the Court of Appeals for the Ninth Circuit agreed, and struck down the offending provision. Respondents appear before this Court to defend the broadened access to funding made possible by the courts below.

The Family Research Institute of Wisconsin also supports the greatest liberty possible in the free exchange of ideas consistent with the First Amendment. Specifically, FRI joins Respondents in proclaiming the importance of the arts, and the need for them to be free of governmental interference. Presumably, Respondents would join with FRI in decrying any attempt to further free speech issues through coercion. If any arts program is to survive constitutional review, it must fit within the parameters of the First Amendment. The FRI simply seeks to ensure that any governmental involvement does not jeopardize the freedom and liberty that are essential to the flourishing of the arts in a democratic society.

Both FRI and Respondents seek to have the Ninth Circuit's decision upheld by this Court. The fact that FRI advances a different rationale for affirmance does not mean its interests are insufficiently aligned with Respondents to allow filing of the brief. The FRI respectfully requests leave to file this brief.

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Interest of Amicus Curiae

The Family Research Institute of Wisconsin, Inc., is a non-partisan, not-for-profit, pro-family, state legislative research institute. The Institute is dedicated to researching issues of interest to, and which have an impact on, Wisconsin families, and then disseminating that information to institutions and individuals. The Institute's goal is to strengthen and educate Wisconsin families.

The freedoms of speech, religion and the press are of inherent value to Wisconsin's families and, hence to the Family Research Institute. Specifically, when government becomes involved in the choice of ideas to be advanced in the marketplace of ideas with taxpayer funds derived, at least in part, from Wisconsin's families, the Family Research Institute believes it necessary to respectfully offer its views regarding the legal and historical principles underlying the treatment of First Amendment principles as they intersect with individual liberties.

Summary of Argument

Congress, in establishing the National Endowment for the Arts, created a financial forum. Forum analysis as it applies to a fund of money is an emerging field, requiring scrutiny of the source of funds going into the forum, and the objects on which it is spent. Purposes for which Congress may appropriate funds are limited by the characterization of the funds comprising the forum. If the contributions are compelled, Congress may use them only to advance goals germane to the purpose of the Federal Government. To do otherwise would violate the First Amendment's Free Speech Clause by compelling individuals to advance speech or ideas with which they may not agree. If the contributions are voluntary, Congress enjoys a broader latitude in what it may fund without offending the First Amendment.

I. Introduction[1]

In 1965, Congress created the National Endowment for the Arts (hereinafter "NEA") as part of the National Foundation on the Arts and the Humanities.[2] In so doing, it provided the *raison d'etre* of the program, *viz.*, to "transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art."[3] The NEA carries out this mandate by appropriating

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[1] Pursuant to Supreme Court Rule 37.6, counsel states that he has authored this brief in whole, and that the Alliance Defense Fund has made a monetary contribution to its preparation.

[2] 20 U.S.C. section 951 *et. seq*.

[3] 20 U.S.C. section 951(11). As justification for the program, Congress made the following findings:

> (1) The arts and the humanities belong to all the people of the United States.
>
> (2) The encouragement and support of national progress and scholarship in the humanities and the arts, while primarily a matter for private and local initiative, are also appropriate matters of concern to the Federal Government.
>
> (3) An advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.
>
> (4) Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants.
>
> (5) It is necessary and appropriate for the Federal Government to complement, assist, and add to

programs for the advancement of the humanities and the arts by local, State, regional, and private agencies and their organizations. In doing so, the Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.

(6) The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.

(7) The practice of art and the study of the humanities require constant dedication and devotion. While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.

(8) The world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit.

(9) Americans should receive in school, background and preparation in the arts and humanities to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression.

(10) It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to

taxpayer funds and distributing them to, *inter alia*, individuals for productions, performances, workshops or other related activities.[4] The Chairperson of the NEA, in consultation with the National Arts Council, selects the recipients of this munificence.[5]

Amicus is in entire agreement with Congress' assignment of such great weight and importance to the arts and humanities, and favors the laudable goals expressed in the enabling legislation. However, good intentions notwithstanding, the current method of funding this financial forum and granting disbursements violates the First Amendment's guarantee of the freedom of speech. Amicus respectfully suggests that the Ninth Circuit's decision be upheld, but upon the grounds that form the basis for this brief.

provide financial assistance to its artists and the organizations that support their work.

(11) To fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people, the Federal Government must transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art.

(12) In order to implement these findings and purposes, it is desirable to establish a National Foundation on the Arts and the Humanities.

20 U.S.C. section 951.

[4] 20 U.S.C. sections 954(c), 960.

[5] *Id.*

II. Taxpayer Funding of the NEA Constitutes Compelled Speech

A. Financial Fora

This Court's opinions have nearly completed a very neat framework within which to analyze free speech issues touching on the creation of, and access to, various fora for the expression of ideas. Forum analysis for free speech cases is not limited to the traditional question of access to buildings, sidewalks or parks. As this Court noted in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*,[6] it is possible to create a forum in a metaphysical sense through a pool of funds, which would implicate the same array of access questions as in a traditional forum. The emerging picture of what may be labeled "financial fora" is that they have two related but distinct aspects. The first treats the means by which the forum was funded, the second addresses how the money is distributed from the forum to its recipients. Such fora could be viewed as a ledger of transactions, tracking the source of income and the purposes for which the income is spent. *Rosenberger* itself provided the definitive accounting guidelines for the expense side of the ledger, holding that potential recipients may not be excluded on the basis of the viewpoint they advocate. It was also *Rosenberger* that identified the unanswered question on the rules for the income side of the financial forum ledger: "Finally, . . . I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees."[7] As a result of the NEA's statutory

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[6] 515 U.S. 819, 830 (1995).

[7] 515 U.S. at 851 (O'Connor, J. concurring).

framework, this question must be resolved in the case at Bar so that the free flow of speech and ideas may continue unimpeded.

B. The NEA is a Financial Forum

Congress has created a financial forum through the appropriations authorized by 20 U.S.C. section 960. The distribution of funds brought into that forum is controlled by the terms of 20 U.S.C. section 954(c), which favors:

> (1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;
>
> (2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons;
>
> (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;
>
> (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;
>
> (5) projects and productions that will encourage public knowledge, education,

understanding, and appreciation of the arts;

(6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;

(7) programs for the arts at the local level;

(8) projects that enhance managerial and organizational skills and capabilities;

(9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and

(10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

Additionally, "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . . ."[8]

Amicus notes that the District Court concluded that "government funding of the arts is subject to the constraints of the First Amendment"[9] Respondents are troubled by the content restriction they see in the decency clause. In truth, though, this is of a kind with the standards enumerated in section 954(c) -- each mandates decisions based on the content and viewpoints of the material the applicants seek to have

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[8] 20 U.S.C. section 954(d)(1).

[9] *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457, 1475 (C.D. Cal. 1992).

funded.[10] The infirmity of the decency clause is not that it, as opposed to the other standards, impermissibly impinges on the First Amendment, but rather that such restrictions are inconsistent with the method by which the financial forum is funded and the entity creating the forum, thereby contravening the strictures of the First Amendment.

C. Correlation Between how a Financial Forum is Funded and its Permissible Disbursements

Financial fora are created either through voluntary donations or compelled contributions. The method by which they are funded dictates what may be done with the money so received. For example, in *Abood v. Detroit Bd. of Ed.*,[11] this Court addressed a legislatively mandated "agency shop" arrangement for local government employees. Whether a member of the union or not, employees were required to contribute equal amounts, some part of which was used to advocate ideas and positions not directly attributable to the core function of the union. It was concluded that to the extent contributions were compelled, the union was prohibited from using the money for any purpose not directly germane to the purpose of a labor union. On the other hand, so long as the contributions were voluntary, the union was free to put that money to whatever use it desired. Similarly, lawyers in an integrated bar may successfully preclude the State Bar from using part of the mandatory dues to advocate legislation and goals not related to the effective governance of the member

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[10] *See Finley v. National Endowment for the Arts*, 100 F.3d 671, 688 (1996) (Kleinfeld, J. dissenting) ("artistic merit" and "artistic excellence" are content-based judgments).

[11] 431 U.S. 209 (1977).

attorneys.[12] If the member lawyer does not object, there is no proscription found against such advocacy.

In a case with aspects similar to the one at Bar, this Court addressed the public financing of presidential elections.[13] Unquestionably, such financing implicates the very heart of the Free Speech Clause -- political speech and elections. Funds from general revenue were appropriated to be provided to political parties, nominating conventions, and candidates willing to abide by the restrictions of the financing scheme. The program survived a First Amendment challenge because this Court found that it furthered, rather than abridged, "pertinent First Amendment values."[14] However, one of the key provisions of the program limited grants to the parties, conventions and candidates to the amount collected through the "check-off" option on taxpayers' income tax returns. Thus, the financial forum created by Subtitle H of the Internal Revenue Code consisted of funds voluntarily provided. Therefore, Congress was free to implement a full panoply of regulations respecting who the recipients would be and the terms upon which grants would be made without offending the First Amendment.

In *Rust v. Sullivan*,[15] this Court considered whether the First Amendment was transgressed when funds were appropriated from the general revenue to fund a family planning program. Part of the regulations prohibited any

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[12] *Keller v. State Bar of California*, 496 U.S. 1 (1990).

[13] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[14] *Id.* at 92.

[15] 500 U.S. 173 (1991).

recipient of Title X funding from encouraging patients to consider abortion as an alternative to carrying the child until birth. It was concluded that Congress, when pursuing an otherwise legitimate purpose, may condition the grant of funds on complying with the terms of the grant, even when such terms included a content-based ban on speech.[16] In funding a program to accomplish a particular goal, it is not Constitutionally required to fund a program attempting to achieve the opposite result. Contextually understood, then, the impact on speech was merely incidental to Congressional pursuance of a goal germane to its authority.

The federal government's power to appropriate from the public fisc has been construed expansively beginning with this Court's decision in *U.S. v. Butler*,[17] in which it was concluded that public funds need not be spent to advance any particular object enumerated in the Constitution, and is limited only by the mandate that the purpose for the expenditure fit within the rubric of "the general welfare."[18] However, the expenditure must also submit to other provisions of the Constitution. Thus, this Court has consistently held that direct subsidies to sectarian activities violates the Establishment Clause of the First Amendment at its most fundamental level.[19]

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[16] 500 U.S. at 193-94.

[17] 297 U.S. 1 (1936).

[18] *Id.* at 65-66.

[19] *See Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947) (The Establishment Clause means, at a minimum, that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion"); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) (The "[Establishment] Clause does

This does not mean, though, that government trespasses on the First Amendment when governmental resources are used by individuals or organizations of faith. Thus, for example, outside organizations with a faith-based presentation of issues may have equal access to school buildings during non-instructional hours,[20] and school districts must make school facilities available to faith-based student organizations on the same terms as other student organizations.[21] As long as the resources were not created for the express purpose of advancing religion, there is no Constitutional harm in allowing equal access to all members of society. Nor is there a violation when the incidental effect of governmental expenditures assists such

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absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Committee for Public Ed. v. Nyquist*, 413 U.S. 756, 780 (1973) ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid"); *id.*, at 772 (Primary evil against which the Establishment Clause protects is the sponsorship and active or financial involvement of the government in things religious.); *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*") (emphasis in original); *Flast v. Cohen*, 392 U.S. 83, 103-104 (1968) ("Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general").

[20] *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

[21] *Widmar v. Vincent*, 454 U.S. 263 (1981); *Westside Comm. Bd. of Ed. v. Mergens*, 496 U.S. 226 (1990).

individuals or organizations.[22] *Sotto voce*, these cases recognize that when a forum's source of funds is compelled through the government's taxation authority, it may only put that money to uses germane to its core functions.

D. Historical Foundation for Financial Forum Analysis

These cases define the basic contours of the principles underlying financial forum analysis. When the contributions to the forum are compelled, the funds may be used only for purposes germane to the central functions of the creating entity.[23] On the contrary, when the funds are voluntarily given, disbursement can be made for a broader range of purposes without offending First Amendment principles.[24] The rationale for such treatment is lodged deep within our historical understanding of what is essential to a free society.

1. Governmental Compulsion in the Realm of Ideas

In comprehending that understanding, one must begin with a recognition that the right to refrain from advocating an idea is protected with as much fervor as the right to speak one's

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[22] *See Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (grants to non-profit organizations with religious affiliations for sex education); *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 741 (1976) (grants to colleges with religious affiliations); *Bradfield v. Roberts*, 175 U.S. 291, 299-300 (1899) (funding of health care for indigent patients at a hospital with a religious affiliation).

[23] *Rust*, 500 U.S. 173; *Abood*, 431 U.S. 209; *Keller*, 496 U.S. 1.

[24] *Buckley*, 424 U.S. 1.

mind.[25] "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[26] Further, for Constitutional purposes, it matters not whether the transgression on that freedom is accomplished by requiring an individual to verbally proclaim an idea he disbelieves, or by appropriating some measure of his property to the service of such an idea.[27] This protection, enshrined in the First Amendment's provision that "Congress shall make no law . . . abridging the freedom of speech" has a long and distinguished pedigree, as this Court's prior decisions make apparent.

Abood affirmed that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[28] The centrality of this doctrine was emphasized when this Court reasoned that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess

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[25] *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

[26] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[27] *See Abood*, 431 U.S. 209 (union may not force members to financially support non-germane advocacy); *Keller*, 496 U.S. 1 (State Bar may not force member attorneys to fund non-germane advocacy); *Wooley*, 430 U.S. 705 (motorist may not be compelled to display on his license plate a message he finds distasteful); *Barnette*, 319 U.S. 624 (school may not compel student to recite Pledge of Allegiance).

[28] 431 U.S. at 234-35.

by word or act their faith therein."[29]

As a touchstone, *Abood* reached back to James Madison's rhetorical question "'[w]ho does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?'"[30] Mr. Jefferson, drawing upon his survey of political history "swor[e] upon the altar of God eternal hostility to every form of tyranny over the mind of man."[31] His down payment on that oath was the Virginia Act for Religious Liberty, cited by *Abood*, which provides, in pertinent part:

> Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, *or burthens*, . . . tend only to beget habits of hypocrisy and meanness . . . ; that the impious presumption of fallible and uninspired men, . . . [have] set[] up their own opinions and modes of thinking as the only true and infallible, and as such endeavor[] to impose them on others . . . ; *that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical* . . . ; that our civil rights have no dependence on our religious opinions any more than our opinions in physics or

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[29] *Barnette*, 319 U.S. at 642.

[30] 431 U.S. at 234-35 n.31 (quoting 2 The Writings of James Madison 186 (Hunt ed. 1901)).

[31] II Henry Schofield, Essays on Constitutional Law and Equity 363 (Faculty of Law, Northwestern University, ed. 1921).

geometry . . . .[32]

After its passage, Mr. Madison exulted that the Act's provisions "have in this country extinguished forever the ambitious hope of making laws for the human mind."[33] He may have spoken somewhat prematurely, for the goal was still a work in progress in 1794, when Mr. Jefferson opined:

> The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. But our rules can have no authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit.[34]

Though Messrs. Jefferson and Madison were specifically addressing liberty of opinion regarding religion, it is clear that Mr. Jefferson understood this liberty to fully encompass the realm of ideas:

> Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. Thus in France the emetic was once forbidden as a medicine and the potatoe [sic] as an article of food. Government is just as infallible too when it fixes systems in physics. Galileo was sent to the inquisition for affirming that the earth was a sphere: the government had declared it flat as a trencher, and Galileo was obliged to abjure his

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[32] Va. Code Ann. sec. 57-1 (1950) (originally enacted January 16, 1786) (emphasis added).

[33] Irving Brant, James Madison: The Nationalist 354 (1948).

[34] Thomas Jefferson, Notes on the State of Virginia 231 (2nd Amer. ed. 1794).

> error. This error however at length prevailed, the earth became a globe, and Descartes declared it was whirled round its axis by a vortex. The government in which he lived was wise enough to see that this was no question of civil jurisdiction, or we should all have been involved by authorities in vortices. In fact, the vortices have been exploded, and the Newtonian principal of gravitation is now more firmly established, on the basis of reason, than it would be were the government to step in, and to make it an article of necessary faith.[35]

The error is of no lesser magnitude when civil authority, instead of prescribing by diktat what shall be orthodox, seeks to advance one opinion over another in the marketplace of ideas.

2. Impermissible Financial Compulsion

Civil authorities must:

> "presume that speakers, not the government, know best both what they want to say and how to say it. . . . [E]ven with the purest of motives, [the government] may not substitute its judgment as to how best to speak for that of speakers and listeners . . . ."[36]

Buckley recognized that money is an integral part of speech: "[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political

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[35] Jefferson, *supra* at 232-33.

[36] *Riley v. Nat. Fed. of Blind*, 487 U.S. 781 (1988).

goals."[37] If so, the opposite is a necessary corollary: mandating a contribution forces a person to combine with persons who are not necessarily like-minded in furtherance of a goal not necessarily sought by the contributor. This imposition on an individual's will has been roundly criticized for centuries.

After denominating a citizen's basic, fundamental rights as personal security, personal liberty and private property, William Blackstone observed that

> there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights[;] the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most excessive sense.[38]

Alexander Hamilton, in writing an installment of the Federalist Papers, was surely cognizant of this fact when he noted that "[i]n the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"[39]

E. Disbursements by the NEA are Inconsistent With the Method by Which the Forum is Funded

Alexander Hamilton observed that:

> In disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasoning must depend. These contain an internal evidence which,

[37] 424 U.S. at 22.

[38] I William Blackstone, Commentaries *129.

[39] The Federalist No. 79, at 528 (emphasis in original).

> antecedent to all reflection or combination, commands the assent of the mind.[40]

Such are the preceding principles establishing the right of every person to be free in forming beliefs and opinions by one's own reason and conscience, and the concomitant right to not suffer a financial burden to advance ideas with which one does not agree.

The NEA is essentially a clearinghouse for funds appropriated from the general revenue, derived from taxpayers upon pain of prosecution should they fail to comply with the Internal Revenue Code. There is no option similar to the one addressed in *Buckley* in which taxpayers would be free to choose whether or not to fund the Agency's activities. Thus, the money entrusted to the NEA chair and Council for distribution comes entirely from compelled contributions. Congressional *ipse dixit* that this compelled speech is, in fact, good for the general welfare, cannot disguise the harm such a program wreaks on our First Amendment values. Blackstone understood that "every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, *or a popular assembly*, is a degree of tyranny."[41] In fact, some have argued that the very fact the compelled contribution stems from a governing majority presents a greater, rather than a lesser, threat to the free flow of opinions and ideas:

> It is in the examination of the exercise of thought in the United States that we clearly perceive how far the power of the majority surpasses all the powers with which we are acquainted in Europe. Thought is an invisible

[40] The Federalist No. 31, at 193 (Easton Press 1979).

[41] I Blackstone, *supra* at *126 (emphasis added).

and subtle power that mocks all the efforts of tyranny. At the present time the most absolute monarchs in Europe cannot prevent certain opinions hostile to their authority from circulating in secret through their dominions and even in their courts. It is not so in America; as long as the majority is still undecided, discussion is carried on; but as soon as its decision is irrevocably pronounced, everyone is silent . . . . The reason for this is perfectly clear: no monarch is so absolute as to combine all the powers of society in his own hands and to conquer all opposition, as a majority is able to do, which has the right both of making and executing the laws.

The authority of a king is physical and controls the actions of men without subduing their will. But the majority possesses a power that is physical and moral at the same time, which acts upon the will as much as upon the actions and represses not only all contest, but all controversy.[42]

M. de Tocqueville correctly identifies the awesome power the majority holds and its capacity to eviscerate all competing opinions when combined with the power of government. Indeed, as Mr. Carroll remarked in discussion of the Bill of Rights in the House of Representatives, "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ."[43]

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[42] I Alexis de Tocqueville, Democracy in America 263 (Phillips Bradley, ed. 1991).

[43] II Bernard Schwartz, The Bill of Rights: A Documentary History 1088 (1971) (quoting debates of the House of Representatives on

While thought may mock all attempts at tyranny, the government has at its disposal, through the power to tax and spend, the means to deliver more than a gentle touch to the liberties of conscience.

Our Bill of Rights, a distinctly anti-majoritarian compilation of safeguards, was proposed so that the liberties of conscience would not suffer government's touch:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[44]

Although direct governmental promotion of matters of secular opinion through an exaction of taxes does not normally raise popular ire to the extent that direct financial subsidies of religious activities does, it should. In responding to an argument in which it was asserted that abridgements of the freedom of speech by a state government may be chimerical, Justice Black stated, "I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or

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August 14, 1789).

[44] *Barnette*, 319 U.S. at 638.

causes that they are against."[45] As Mr. Jefferson has eloquently elucidated, freedom in both matters of faith and of opinion derive from precisely the same principle -- civil authority ought to have no power over matters of the mind.

Nor does the fact that the NEA funds a broad array of activities protected by the First Amendment do anything to reduce the offensiveness of the expenditures. Should the proponents of public funding in the Establishment Clause cases have argued that no harm was done because the appropriations were going to a profusion of organizations with differing views on religion, they would surely have found their position unavailing. The offense is in being compelled, in any degree, to directly support the advancement of religious speech or activity. So too, here, the transgression is not lessened because a wide variety of artistic endeavors receive financial support. Because the income side of the ledger for this financial forum is characterized by compulsion, the purposes for which those funds may be spent must be limited to matters otherwise germane to the federal government.

Congress, in creating the NEA, was pursuing no other goal than that expressed in its findings -- to enter the marketplace of ideas with the sole intention of promoting, with taxpayer funds, expressive conduct that garners insufficient support in the marketplace to have the impact Congress desires. Thus, it specifically declared the necessity to financially promote artistic endeavors that "without such assistance, would otherwise be unavailable to our citizens"[46] and to "enable

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[45] *Lathrop v. Donohue*, 367 U.S. 820, 873 (1961) (Black, J. dissenting).

[46] 20 U.S.C. section 954(c)(2).

[artists] to achieve wider distribution of their works . . . ."[47] The effect on speech is not incidental, it is the entire purpose of the program.

Congress has settled on an impermissible mix of income type and subject of expenditure. The ledger does not balance. The power to tax and spend is so great that special care must be taken in ensuring government's hand does not even gently touch matters of conscience. In procuring expressive conduct for its own sake, Congress has re-entered the realm denied it by the First Amendment. Only in an Orwellian world-view would it be possible to argue that free speech is furthered on the back of compelled contributions. At an irreducible minimum, if Congress wishes to foster the expansion of the arts and their broader availability, the money going into the forum must be voluntarily given, *a la* the public financing of presidential campaigns approved in *Buckley*. Anything less fails to comport with Jefferson's admonition that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . ."[48]

III. Conclusion

This Court has already held that a labor union, under the auspices of State law, may not compel the support of its members for non-germane purposes. Nor may a State Bar, created pursuant to State law. It would be ironic indeed if the Federal Government, with limited and enumerated powers, had wider latitude in compelling speech than would a State

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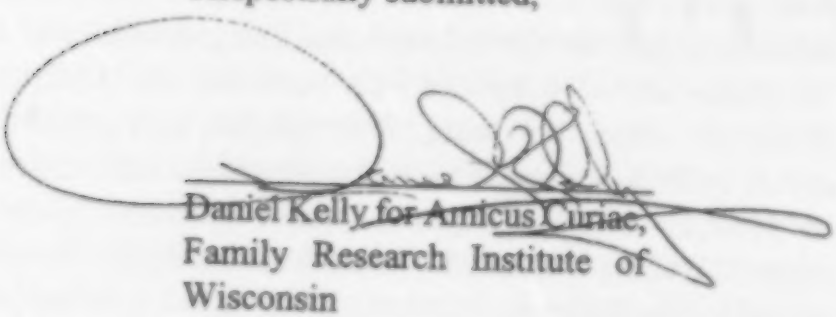
[47] 20 U.S.C. section 954(c)(3).

[48] VA Code Ann. sec. 57-1.

government, with plenary authority in its sphere, or one of its functionaries. The principles of free speech will suffer injury as long its proponents seek to further its goals via money extracted from unwilling donors. Amicus urges this Court to uphold the Ninth Circuit Court of Appeals' decision, but for the reasons herein advocated.

Respectfully submitted,



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BRIEF *AMICI CURIAE* OF THE NEW SCHOOL FOR SOCIAL RESEARCH AND THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

Amicus The New School for Social Research[2] (the "New School") is a not-for-profit, tax-exempt education corporation

[1] Letters of Consent by the Parties to the filing of this brief are submitted to the Court herewith.

[2] On February 4, 1997, the Board of Regents of the State of New York approved a Charter Amendment changing the formal legal name of the institution to "New School University".

chartered by the Board of Regents of the State of New York. The New School is a university with undergraduate, graduate, and professional degree programs. Through its seven academic divisions, including its main campus in New York City, the New School serves thousands of students each year. The New School was founded in 1919, when it began as the nation's first institution of higher learning dedicated to the education of adults. In the many years since, the New School has enlarged its mission and has grown to be a center of intellectual and artistic excellence, located in the vibrant lower Manhattan community. Today with more than 6,000 full-time degree students pursuing training in the arts, political and social sciences, humanities, architecture, public policy, music and drama, the New School is a leader in undergraduate and graduate training. In addition, more than 20,000 students annually attend the New School in part-time, certificate, preparatory and personal enrichment academic programs.

The arts have been an integral part of the New School since its founding, and it has been a center of cutting-edge education in the arts and a place for performance opportunities for emerging artists. Many important artists—including Bernie Abbott, Aaron Copland, Martha Graham, and Robert Frost—have been associated with the School. Today the New School is one of the nation's largest centers of arts instruction. Over one million people have taken courses or participated in its arts programs offered to the public. In addition to over 2,000 adult students taking courses in the arts, more than half of the School's degree students are enrolled in the School's arts faculties, centered in three of the School's academic divisions: Mannes College of Music, The School of Dramatic Arts (in partnership with the Actors Studio), and Parsons School of Design. For nearly thirty years, the New School has been a recipient of grants disbursed by Petitioner The National Endowment for the Arts ("NEA"). The New School has used those funds, together with matching funds provided by private donors, for a variety of projects of benefit both to the university community and the general public.

The New School is no stranger to the First Amendment issues raised by viewpoint- and content-based restrictions imposed by Congress on recipients of NEA grants. In 1990 the New School instituted suit in the United States District Court for the Southern District of New York challenging the constitutionality of the statutory scheme adopted in 1989 by Congress in response to the same controversy concerning the use of NEA funds that led to the enactment of the statute at issue here in 1990. *New School for Social Research* v. *Frohnmayer*, No. 90 Civ. 3510 (LLS) (S.D.N.Y.). The statutory provision at issue in the prior case required all grant recipients to provide, as a precondition to receipt of any grant, an oath certifying that they would not later use funds granted by the NEA in a manner "which in the judgment of the National Endowment for the Arts . . . may be considered obscene," as that term was defined in Section 304(a) of the Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. 101-121, 103 Stat. 701, 741, and to accept legal responsibility for enforcement of the restrictions set forth in Section 304(a). That litigation was settled when the NEA stipulated and agreed to delete the certification requirement from the "General Terms and Conditions for Organizational Grant Recipients". Stipulation and Order, *New School for Social Research* v. *Frohnmayer*, No. 90 Civ. 3510 (LLS) (S.D.N.Y. Feb. 20, 1991).[3]

Amicus The Brennan Center for Justice at New York University School of Law (the "Brennan Center") is a partnership between and among the family and friends of Justice William J. Brennan, Jr., many of his law clerks, and the faculty of New York University School of Law, designed to honor Justice Brennan's extraordinary contribution to American law. The

[3] In related litigation, a California federal court subsequently ruled the certification requirement unconstitutional under the First and Fifth Amendments. *See Bella Lewitzky Dance Foundation* v. *Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991). The NEA did not appeal from that ruling.

Brennan Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist courts and legislatures in developing solutions to difficult problems in areas that were of special concern to Justice Brennan. Before giving his approval to the enterprise, Justice Brennan obtained a promise that the Brennan Center would function as a non-partisan, independent center of thought, paying no special deference to his views or opinions. This case presents the Court with a First Amendment issue of dramatic importance to Justice Brennan's lifelong struggle to maintain a free market in ideas: May government, acting on behalf of a temporarily-constituted majority, impose viewpoint-based constraints such as "decency" and "respect" on the grant of government subsidies to artists?

This case is of particular importance to the Brennan Center because the Center is providing counsel to the plaintiffs in *Velazquez* v. *Legal Services Corp.*, No. 97-CV-182, 1997 WL 789369 (E.D.N.Y. Dec. 22, 1997) (appeal pending), challenging the constitutionality of government efforts to control the First Amendment activities of Legal Services lawyers by imposing onerous conditions on the receipt of federal funds by lawyers for the indigent. *See also Legal Aid Society* v. *Legal Services Corp.*, 961 F. Supp. 1402 (D. Haw.), *modified*, 981 F. Supp. 1288 (D. Haw. 1997) (appeal pending). As the Chief Justice noted in *Rust* v. *Sullivan*, 500 U.S. 173, 200 (1991), when government funds traditional associational relationships of intense First Amendment concern, such as university teacher-student, doctor-patient, and, presumably, lawyer-client, it may not seek to use its economic power to control the First Amendment activities of the participants. In the arts, as in the legal profession, Congress may no more manipulate the speech of private persons through the viewpoint-based carrot than it may through the viewpoint-based stick.

SUMMARY OF ARGUMENT

Congress is not required to fund the arts. Neither the First Amendment nor any other constitutional provision imposes any such requirement. When the government chooses to do so, it is entitled to make funding decisions based upon its own determinations of artistic excellence. What it may not do, however, is to engage in a funding process which, by its nature, constitutes viewpoint discrimination in violation of well-established First Amendment principles.

The standards by which NEA grants are to be awarded under the 1990 statutory language require the NEA Chair to ensure that such judgments "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1) (1994). The *Amici Curiae* submit this Brief to demonstrate that those legislatively-imposed standards on funding constitute the very sort of unconstitutional viewpoint discrimination that the First Amendment does not tolerate. This is so whether the restriction takes the form of direct statutory regulation of protected artistic expression or the indirect—but nonetheless real—regulation of that expression through its selective subsidization. *Amici* also urge the Court to consider the broader First Amendment dangers that would be posed if government could make the funding of academic, as well as artistic, endeavors contingent on conformity to the generalized notions of "decency" and "respect" imposed by a temporarily-constituted majority.

ARGUMENT

THE "DECENCY" AND "RESPECT" CRITERIA SET FORTH IN SECTION 954(d)(1) VIOLATE THE FIRST AMENDMENT

A. The Viewpoint Discrimination at The Core of Section 954(d)(1) Would Violate The First Amendment If It Took The Form of Direct Punishment of Speech

Certain constitutional propositions have so often been articulated by this Court that the only undetermined question they leave open is the identification of those rare circumstances in which they do not apply. There is no dispute, for example, about the validity of the general proposition that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dep't* v. *Mosley*, 408 U.S. 92, 95 (1972). Or that where government seeks to punish speech because of its viewpoint, the violation of the First Amendment "is all the more blatant." *Rosenberger*, v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). This Court has frequently reasserted that "[t]he government may [neither] regulate . . . based on hostility—or favoritism—towards the underlying message expressed," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 386 (1992), nor regulate so as to favor the views of one speaker over those of another. *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

The principle underlying these now unexceptionable propositions lies at the heart of the First Amendment: it is to prevent government, as it responds to the will of temporarily-constituted majorities, from stifling or burdening dissent, nonconformity, or ideas that otherwise displease the majority. This Court has repeatedly struck down laws and regulations

that it has concluded do just that. *E.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 55 (1988) ("An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.").[4]

These principles apply with particular force when the disfavored speech is considered by government to communicate "indecency" or "disrespect". *See Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment."); *Carey* v. *Population Services Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."). Just last Term, this Court struck down as impermissible content discrimination a federal statute criminalizing "indecent" speech transmitted over the Internet. *Reno* v. *ACLU*, 117 S. Ct. 2329, 2348 (1997) (observing that statute could extend to "artistic images that include nude subjects"). Indeed, outside the special—and extremely narrow—context of protecting children from the "pervasive" impact of broadcasting, this Court has never permitted Congress to impose general standards of "decency". *Compare FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) *with Reno*, *supra*. And this Court has never—in any context—sanctioned the imposition by Congress of a

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[4] Indeed, this Court has not only assured that the First Amendment protects offensive speech; it has often gone the next step to observe that "a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it involves a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949); *accord Johnson*, *supra*, 491 U.S. at 408-09.

standard of "respect". *Cf. Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943) ("Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee."); *United States* v. *Eichman*, 496 U.S. 310, 317 (1990) (striking down flag desecration described by Court as "unmistakably connot[ing] disrespectful treatment of the flag").

Protecting non-conformity and dissent is of particular concern in the context of academic and artistic expression. Both art and academic inquiry have traveled through history on a curious but parallel track: they have time and again generated "intellectual awakening," *Rosenberger*, *supra*, 515 U.S. at 836; at the same time, history is littered with proof that with such awakenings come ideas that challenge and confront—and enrage—governments. *See*, *e.g.*, *Suspended License: Censorship and the Visual Arts* 192-94 (E. Childs ed., 1998). It is precisely in the fields of artistic and academic endeavor, where "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition," that the "danger" of stifling dissent or non-conformity is "especially real." *Rosenberger*, *supra*, 515 U.S. at 836; *accord Keyishian* v. *Board of Regents*, 385 U.S. 589, 603, (1967) ("That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.").[5] Not surprisingly, what the Court said of music in *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790 (1989), is true of art and academic inquiry in general: "From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known [their] capacity to appeal to the intellect and to the emotions, and have censored [them] to serve the needs of the state."

[5] The interplay between artistic and academic freedom is of special concern to the New School, which is both a university and, through its faculty and students who teach and study music, dance, writing and the visual and performing arts, a center of artistic expression.

Art, no less than philosophy, shapes the perceptions and attitudes that are antecedent to, and, ultimately, formative of, society's political activity. It is no coincidence that totalitarian societies cannot tolerate artistic freedom. *See* H. Lehman-Haupt, *Art Under a Dictatorship* (1954); J. Clapp, *Art Censorship: Chronology of Proscribed and Prescribed Art* (1972). Totalitarianism depends on a psychological acceptance of the idea that there is a single, officially-defined way to view the world. Hitler[6] and Stalin[7] waged war on artistic freedom because they understood that, by its nature, art subverts the totalitarian insistence that the world must be seen in only one way. The hyper-realism and rigorous classicism that characterized the official aesthetic of Stalinist Russian and Nazi Germany reinforced a governmentally-enforced insistence on a single world-view. Indeed, the aesthetic common denominator that links the paintings condemned by Hitler in the Munich Exhibition of "degenerate art" with Stalin's notorious suppression of Soviet artists is a rejection of any effort to portray multiple, unconventional visions of reality. It is precisely the capacity to remind us, again and again, that the world view of the transient majority is not the *only* world view that makes a free society's artists among its most important democratic practitioners. It is thus precisely in art where it is particularly " 'hazardous to discourage thought, hope and imagination . . . .' " *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (*quoting Whitney* v. *California*, 274 U.S. 357, 375 (Brandeis, J., concurring)).

We begin with the above principles not because the brief of the Solicitor General takes issue with them but because what Congress has done is in conflict with them. Section 954(d)(1) requires the NEA's Chair to "ensure" that "artistic excellence and artistic merit are the criteria by which applications are

[6] For a description of Nazi efforts to control art, see Lehman-Haupt, *supra*, at 219-30.

[7] For a description of Soviet efforts to control art, see *id.* at 78-87.

judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public. . . ." 20 U.S.C. § 954(d)(1). "Decency" and "respect" surely exemplify what this Court has defined to be a "viewpoint," namely "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, *supra*, 515 U.S. at 831. The "prohibited perspective," *id.*, is, in fact, whatever is the current viewpoint of the current majority—expression that is not "decent" or does not reflect "respect" suffers the additional burdens imposed by section 954(d)(1); an accepted perspective—a governmentally-sanctioned one—suffers no such burden. On its face, the statute constitutes clear and unambiguous viewpoint discrimination; it codifies the majority's preferred morality.

While no inquiry into the legislative purpose animating Section 954(d)(1) is needed to find the provision viewpoint discriminatory, there can be no mistake as to the particular viewpoints of which Congress disapproved. Section 954(d)(1) was enacted because Congress disapproved of the viewpoints of two controversial artists who had previously received NEA funding: Robert Mapplethorpe and Andres Serrano. Mapplethorpe's work was reviled as glorifying homosexuality. *See* Remarks of Sen. Helms, 135 Cong. Rec. S12111 (daily ed. Sept. 18, 1989) ("It is an issue of soaking the taxpayer to fund the homosexual pornography of Robert Mapplethorpe, who died of AIDS while spending the last years of his life promoting homosexuality."). Serrano's work was repeatedly deemed to have been blasphemous. *See* Remarks of Sen. Helms, 135 Cong. Rec. S5595 (daily ed. May 18, 1989) (asserting that fellow Senator "is absolutely correct in his indignation and in his description of the blasphemy of the so-called artwork. I do not know Mr. Andres Serrano, and I hope I never meet him. Because he is not an artist, he is a jerk."). *See also* Brief *Amicus Curiae* of Morality in Media in Support of Petitioners at 3-7.

The first result of this surge of congressional reaction was the imposition by Congress of an "oath" under which recipients of NEA grants were to certify that they would not use funds to disseminate what in the NEA's judgment was obscene.[8] Following separate litigations instituted by the New School and the Bella Lewitzky Dance foundation successfully challenging the constitutionality of the oath, Congress sought a new route, recasting "artistic excellence and artistic merit" to include the "taking into consideration [of] general standards of decency and respect for the diverse beliefs and values of the American public . . . ." 20 U.S.C. § 954(d)(1). Whatever else may be said about this language, it was plainly a deliberate congressional response to and rejection of the kind of art that had generated the backlash against the NEA for funding Messrs. Mapplethorpe and Serrano. As Representative Henry, the author of the provision, stated:

> "[T]his substitute includes language at the heart of the grant making grant process. We add to the criteria of artistic excellence and merit a shell, a screen, a viewpoint that must constantly be taken into account. . . ."

136 Cong. Rec. H9417 (daily ed. Oct. 11, 1990).[9]

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[8] The oath required the recipient to certify that

> "[n]one of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value."

Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304, 103 Stat. 701, 741.

[9] Representative Rohrabacher summed up the views of Congress quite succinctly: "The debate over the past year has made it clear that our constituents do not want their tax dollars to be wasted on projects that

There can be little doubt that were the "decency" and "respect" provisions of Section 954(d)(1) enacted as part of a scheme of direct regulation—were government, for example, permitted to enforce a breach of peace statute by "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public"—this Court would strike it down as unconstitutional. *See R.A.V., supra* (holding ordinance unconstitutional that defines "disorderly conduct" to include content- and viewpoint-based categories of speech); *cf. Cohen* v. *California*, 403 U.S. 15, 22 (1971) (invalidating breach of peace conviction for public display of "scurrilous epithet"). The fact that the scheme at issue here appears as a part of limiting criteria for the disbursement of public funds does not, as we show below, render it permissible under the First Amendment.

B. The Viewpoint Discrimination of The "Decency" and "Respect" Provisions of Section 954(d)(1) Can No More Be Imposed As Part of Eligibility Criteria For Government Funding Than It Could As Part of Direct Regulation

In *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court emphasized the breadth of congressional authority to determine how public funds may be allocated. *Id.* at 193. We do not dispute that conclusion. But *Rust* itself acknowledged that "[t]his is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression." *Id.* at 199.

As the Court's language in *Rust* makes clear, it is hardly a novel proposition that the government's acknowledged power to decide whether to fund and who shall be funded may not be

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they find morally reprehensible." 136 Cong. Rec. H9408 (daily ed. Oct. 11, 1990).

used in a manner inconsistent with the First Amendment. This Court, thus far, has identified at least four settings in which the selective exercise of the government's power to reward in order to control expression has been held unconstitutional.

First, in *Speiser* v. *Randall*, 357 U.S. 513 (1958), the Court held that California could not condition the availability of a veterans' property tax abatement on the execution of a loyalty oath. The *Speiser* Court recognized that government could not be permitted to leverage its enormous economic power into an indirect method of requiring viewpoint conformity.

Second, in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), and *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), the Court recognized that, while governing majorities enjoy broad discretion to decide whether to subsidize First Amendment activities, the government may not use the leverage of its funding power to interfere with a subsidized recipient's freedom to use private funds to engage in such protected activities.

Third, in *Keyishian*, *supra*, and *Rust*, *supra*, this Court recognized that in certain areas in which the unregulated flow of speech has traditionally been deemed critical, such as public fora, the university, the doctor-patient relationship and, presumably, the lawyer-client relationship, the government's power to decide what kind of speech to subsidize is dramatically limited. *See Rust*, *supra*, 500 U.S. at 193. For example, in *Keyishian*, the Court rejected the argument that merely because the government subsidizes professors in public universities, it may exercise a degree of control over their First Amendment activities. *See also Sweezy* v. *State of New Hampshire*, 354 U.S 234 (1957). And, in *Rust*, the Court upheld the Title X speech restrictions only after finding that those restrictions did not disturb the freedom of speech that long marked the traditional doctor-patient relationship. *Rust*, *supra*, 500 U.S. at 200.

Finally, this Court has held that, even in areas that are not traditional loci of uninhibited exchange, government may not discriminate invidiously in its subsidies in such a way as to " 'aim[ ] at the suppression of dangerous ideas.' " *Speiser*, *supra*, 357 U.S. at 519 (citations omitted). For example, in *Rosenberger*, *supra*, the Court held that a university could not single out a student-published newspaper that espoused a religious viewpoint for a denial of funding.

Thus, under the clearly established precedents of this Court, Congress, having chosen to subsidize the creation of artistic endeavor by private persons who, as we show below, do not speak for the government, may not use its economic power as a device to impose majoritarian constraints on the viewpoint of art. Whether one views the relationship between artists and the public as an intensely protected First Amendment setting within the meaning of *Keyishian* and *Rust*, or whether one views Congress' behavior as an effort to allocate speech subsidies on the basis of a viewpoint that is acceptable to the majority as in *Rosenberger*, Congress' effort to impose standards of "decency" and "respect" on artists as a criterion for federal funding violates the First Amendment.

The Solicitor General's brief attempts to avoid the reasoning of *Rosenberger* first by asserting that it does not apply to the NEA funding structure, which it seeks to describe as a kind of free-floating regulatory scheme, incapable of precise definition under any of this Court's prior precedents: the NEA's "selective funding of artistic creations," it asserts, "cannot reasonably be described" as "creating a forum for the exchange of private views" because judging art is a "subjective" and "highly contested" enterprise. Brief of Petitioners ("Pet. Br.") at 30. The government, the Solicitor General further argues, "speaks" through the NEA, in a fashion, because it makes its own "aesthetic judgments" about what art to fund. *Id.* at 35-36.

But these efforts are unavailing. The first is refuted by the NEA's original enacting legislation itself. There, Congress

declared its intent "to support new ideas" and "to help create and sustain . . . a climate encouraging freedom of thought, imagination and inquiry. . . ." 20 U.S.C. § 951(10), (7) (1994).[10] A more sweeping directive to foster diverse private speech through government subsidy is difficult to imagine. *Compare* Pet. Br. at 34-35 (observing, without support, that NEA funding scheme "lacks the essential characteristic of a forum 'the free exchange of ideas' ").[11]

Nor, under this Court's precedents, is the NEA free to engage in viewpoint discrimination merely because it necessarily makes "aesthetic judgments" that contain an "element" of content control. For, while the Court has permitted government to control the viewpoint expressed "when it is the speaker or when it enlists private entities to convey its message," *Rosenberger*, *supra*, 515 U.S. at 833 (citing *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981)), the Court also made clear the impropriety of viewpoint-based restrictions in funding when government "does not itself speak or subsidize trans-

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[10] The Senate Report accompanying the legislation likewise provided that "the intent of this act should be the encouragement of free inquiry and expression. . . ." S. Rep. No. 89-300, at 4 (1965).

The Solicitor General, ignoring both the statute and its legislative history, suggests that the "subjective and highly contested" nature of the grant-review process somehow deprives that process of its indisputable character as a forum. But why should that be so? The mere fact of scarcity and subjectivity—the fact that only a small percentage of applicants receive funding and the fact that the NEA makes "editorial judgments"—can hardly deprive the program of its core characteristic, central to this Court's decision in *Rosenberger*, of the "expend[iture] of funds to encourage a diversity of views from private speakers." *Rosenberger*, *supra*, 515 U.S. at 834.

[11] We note, as well, that the Solicitor General misreads this Court's conception of a "forum". The funding scheme struck down in *Rosenberger* did not, as the Solicitor General suggests, involve a kind of private drawing room of idea-swapping. The purpose of the University's Student Activities Fund was to promote "a broad range of extracurricular activities that 'are related to the educational purpose of the University.' " *Rosenberger*, *supra*, 515 U.S. at 824.

mittal of a message it favors *but instead expends funds to encourage diversity of views from private speakers*." 515 U.S. at 834 (emphasis added). Contrary to the argument of the Solicitor General, this principle does not evaporate merely because the government exercises some degree of content control over the subject matter. *See, e.g., Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (viewpoint-based restrictions directed against speech in a limited public forum presumed impermissible if speech within forum's subject matter limitations); *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 811-13 (1985) (same analysis requiring viewpoint neutrality in nonpublic forum where subject matter could be regulated); *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 393 (1993) (holding that, even assuming that an extracurricular film series in a public school was not a public forum, a school district may not "permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint"); *see also R.A.V., supra*, 505 U.S. at 386, 388 ("the power to proscribe [speech] on the basis of one content element (e.g. obscenity) does not entail the power to proscribe it on the basis of other content elements;" thus government "may not prohibit, for example, only that obscentiy which includes offensive political messages").[12]

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[12] Moreover, even granting the notion that aesthetic judgments are "individualized" and involve "communicative elements", in no sense does the government "speak" under the NEA funding scheme in the manner in which the Court suggested was required by *Rust*—with its own point of view, to convey its own message. Indeed, quite the contrary. *See* S. Rep. No. 89-300, at 4 (1965) ("[N]o undue preference should be given to any particular style or school of thought or expression."); *see id.* at 13 (noting that President Johnson, in proposing NEA, sought that government not "seek to restrict the freedom of the artist to pursue his calling in his own way").

The Solicitor General's argument that Section 954(d)(1) does not "categorically prohibit" funding (like the dissent's "prize" theory below, *see*

The Solicitor General seeks to avoid the force of these clear precedents by asserting that the "decency" and "respect" criteria set forth in Section 954(d)(1) do not constitute viewpoint discrimination at all—that the requirements refer not to the "substantive viewpoint or message" a work of art offers but its "mode" or "form". Pet. Br. at 39. Cases are cited involving public schools and broadcasting—two areas this Court has made clear are different from the norm applied in First Amendment cases generally precisely because of the unique role of schools in inculcating values and the then-uniquely pervasive role of radio and television in American life. *See Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 681-82 (1986) (referring to the "objectives of public education as 'the inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system' " and thus according less "latitude" to First Amendment offensive speech rights of "children in a public school" than that accorded to adults) (citation omitted); *compare Pacifica, supra*, 438 U.S. at 748 (1978) ("Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.") (plurality opinion) *with Sable, supra*, 492 U.S. at 127 (noting that *Pacifica* involved notion that "broadcasting is 'uniquely pervasive' " and stating that *Pacifica* was "an emphatically narrow holding" (*quoting Pacifica, supra*, 438 U.S. at 748)) *and Reno, supra*, 117 S. Ct. at 2342 (distinguishing the Internet from broadcasting, which "as a matter of history had 'received the most limited

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Finley v. *National Endowment for the Arts*, 100 F.3d 671, 687-90 (9th Cir. 1996) (Kleinfeld, J., dissenting) (Pet. App. 35a-38a)) is a distinction without any consitutionally-cognizable difference. No one disputes that those works deemed "indecent" or "disrespectful" will suffer a burden not imposed on those works not so deemed. Section 954(d)(1) simply creates additional qualifying criteria (aimed at filtering out the ideas so identified) in order to obtain a grant.

First Amendment protection' " (quoting *Pacifica*, *supra*, 438 U.S. at 748)).

There is no escape for the NEA from generally applied First Amendment standards by invoking words such as "form, mode, or style of expression." Manet's classic painting, "Luncheon on the Grass", was criticized as indecent in its day not because of its "mode" but its content—a nude woman surrounded by two fully dressed, contemporary Parisian men.[13] Courbet's painting, "Sleeping Women", shocked audiences in its day not because of its "form" but its substance—two unclothed women lying on a bed in a sexually suggestive manner.[14] The "general standards of decency" that were deemed violated by Theodore Dreiser, Sinclair Lewis and H.L. Mencken in their days[15] were all understood to be viewpoint-related—what else?—and not rooted in their "form, mode or style."

The same has been true throughout the history of art. The very concept of "indecency" has been a metaphor for majoritarian orthodoxy. Whether it was El Greco offering a "mod-

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13 *See* M. Tannen, *The way of All Flesh*, N.Y. Times, May 14, 1995, at F44 ("The painting caused a scandal in its day, because the woman was clearly a contemporary, not some mythical Venus tossing her drapery around.").

14 *See* J. House, "Manet's *Maximillian*: Censorship and the Salon," *in Suspended License*, *supra*, at 192-94 ("[T]he police kept a watchful eye when [Courbet's] overtly lesbian composition . . . was put on display in a dealer's window.") (citing S. Faunce, *Courbet Reconsidered* (Brooklyn Museum Exhibition Catalogue, 1992) 176).

15 *See* S. Lewis, *The American Fear of Literature* (1930), *reprinted in The Man from Main Street: A Sinclair Lewis Reader* 7-8 (H. Maule & M.H. Cane eds., 1953) (praising Dreiser's battles against convention and censorship); H.L. Mencken, "Theodore Dreiser" and "Puritanism as a Literary Force" *in* H.L. Mencken, *A Book of Prefaces* 96, 197-283 (1917) (same). *See also Commonwealth* v. *Friede*, 171 N.E. 472 (Mass. 1930) (affirming conviction for selling Dreiser's *An American Tragedy* in violation of Massachusetts's obscenity statute).

est and decent" alternative to Michelangelo's "Last Supper",[16] or charges that Veronese's "Last Supper" was filled with "vulgarities",[17] or the accusations leveled at Manet, Chaucer, Shakespeare, and Nabokov,[18] or the suppression of "degenerate" art under the Nazis,[19] or Congressman Dondero's comic-opera attacks on "destructive" and "depraved" art during the McCarthy era,[20] *see generally*, *Suspended License*, *supra*, the use of criteria such as "indecency" and "lack of respect" have had no social meaning other than to signal efforts to impose the viewpoint of the governing majority. Indeed, an almost uncanny parallel exists between the "sense of decency" and "nothing disrespectful" standards imposed on art by the Council of Trent[21] in the sixteenth century, and the criteria of "decency" and "respect" imposed on the NEA by Congress.

To say this is not to disagree with Justice Stevens' observation that speech may sometimes be deemed "too loud or too ugly" to be permitted in certain narrow settings. *See Bolger* v.

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16 *See* A. Blunt, *Artistic Theory in Italy, 1450-1600*, at 118-19 (1940).

17 *See* E.G. Holt, *Religious Art at the Council of Trent and During the Inquisition*, *reprinted in* I J. Merryman & A. Elsen, *Law, Ethics and the Visual Arts*, 249-50 (2d ed., 1987).

18 *See Finley*, *supra*, 100 F.3d at 684 (Pet. App. 28a) (Kleinfeld, J., dissenting).

19 *See* H. Lehman-Haupt, *supra*.

20 *See* W. Hauptman, *The Suppression of Art in the McCarthy Decade*, *reprinted in* Merryman & Elsen, *supra*, at 268-75.

21 *See* II *A Documentary History of Art: Michelangelo and the Mannerists The Baroque and the Eighteenth Century* (E.G. Holt ed., 1947) (quoting 1563 decree of the Council of Trent: "On Sacred Images: . . . [N]othing may appear that is disorderly or unbecoming and confusedly arranged, nothing that is profane, *nothing disrespectful*, since holiness becometh the house of God," and describing trial of Veronese before the Council on charge that his "Last Supper" violated the decree) (emphasis added); *see also* Merryman & Elsen, *supra*, at 248.

Youngs Drug Products Corp., 463 U.S. 60, 83 (1983) (Stevens, J., concurring). Nor do we doubt that works that the NEA itself deems "too loud or too ugly" may not pass whatever aesthetic test it applies. But that is a far cry from denying funding to the Manets or Courbets of today because their messages fail whatever tests of "decency" and "respect" the NEA chooses to apply.[22]

Since notions of "decency" and "respect for American values" have no meaning apart from majoritarian acceptability, Congress' employment of such criteria in the selective allocation of subsidies can be no more than an indirect way of imposing the majority's "viewpoint" on a creative process dedicated to discovering new ways of seeing the world. *Cf. Smith* v. *Goguen*, 415 U.S. 566 (1974) (invalidating flag desecration statute with no ascertainable meaning except majoritarian disapproval). The government may not favor one political idea over another; the equivalent vice in the artistic setting is to suppress non-conforming aesthetic visions—visions that challenge (as they always have and should)—the majority's world view.[23] Section 954(d)(1) inescapably

[22] There is an additional element to the framework of Section 954(d)(1) that renders even more pronounced its viewpoint-based nature. The Commonwealth in *Rosenberger* had advanced (at least through the Court of Appeals) a particularly serious reason for excluding religious publications from funding: an understanding (embraced by four members of this Court) that not to do so would violate the Establishment Clause. *Rosenberger*, *supra*, 515 U.S. at 863-92 (Souter, J., dissenting). But Section 954(d)(1) was not enacted to serve—and on its face does not reflect—any such potentially proper motive. *See* pp. 10-11, *supra*.

[23] The Solicitor General repeatedly observes—without citation—that, as all art is "subjective," "decency" and respect" as a theoretical matter do not differ from other criteria for judging artistic "excellence" or "merit" (such as "form" or "style"). As we have noted, the fact that art involves judgments as to subject matter and quality does not immunize from constitutional scrutiny otherwise impermissible viewpoint discrimination. *See* pp. 15-16, *supra*. But there is, as well, an air of unreality about Petitioner's attempt to treat "decency" and "respect" as nothing more than criteria for "aesthetic judgment". Artistic excellence and merit have always reflected efforts to identify the transcendent, to rise beyond the temporal. Whatever social meanings merit and excellence reflect, they reflect at least the search for the transcendent. *See, e.g.*, K. Clark, *What Is A Masterpice?* 44 (1979). Decency and respect, on the other hand, are inherently and always political constructs; through history (including the history of this Court's constitutional jurisprudence), they have reflected only majoritarian values, and regulations imposing those values on non-conformists and dissenters have been the subject (as we have shown throughout this Brief) of special concern of the First Amendment.

suffers from that vice. As such, it must violate the First Amendment's ban on viewpoint discrimination.

Finally, in this regard, we note the Solicitor General's less than complete reference to the conclusions of the Independent Commission constituted to advise the NEA in 1990, and the Legal Task Force of First Amendment scholars convened by the Independent Commission to advise it.[24] *See* Independent Commission, *A Report to Congress on the National Endowment for the Arts* (September 1990) (the "Report") at 83-91. The Consensus Statement of the Legal Task Force—which the Solicitor General does not quote—concluded, in pertinent part:

> "1. There is no constitutional obligation on the part of the federal government to fund the arts. That is a policy decision to be determined by Congress based upon its views as to whether it is useful and wise for the federal government to play a role in the arts funding process. The Constitution offers no guidance as to whether the arts should be funded by the federal government.
>
> "2. If federal funds are used to subsidize the arts, however, constitutional limitations on how the arts are funded may come into play. The most important of these is that while Congress has broad powers as to how to

[24] Two of the three principal authors of this Brief served on the six-person Legal Task Force.

spend public funds, it may not do so in a way that the Supreme Court has said is 'aimed at the suppression of dangerous ideas.' Congress plainly may, for example, determine to spend all federal funds designated for the arts on music and none on the visual arts. Or vice versa. It may expend funds to celebrate American history or American diversity, even though spending for one purpose naturally means less money is expended on others. And, of course, it may insist on artistic excellence as a prerequisite for any funding. *What it may not do, however, is to choose those to be funded—and, often more important, those not to be funded—in a manner which punishes what Congress views as "dangerous content." When funding denials are the product of invidious discrimination with the aim of suppressing a particular message and for no other reason, a particularly powerful case might be made that the decision was unconstitutional.*"

Report at 85-86 (emphasis added). The Legal Task Force was thus in agreement on one point that is crucial here: Congress—no matter what drafting mechanism it employs—may not, consistent with the First Amendment, impose viewpoint-based restrictions, regardless of whether those restrictions are accomplished directly or indirectly. That proposition, in and of itself, requires affirmance of the ruling of the court below.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Petitioners,

– v. –

KAREN FINLEY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Northwest Lawyers and Artists, Inc.
Portland, Oregon

Toledo Volunteer Lawyers for the Arts
Toledo, Ohio

Walker Art Center
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QUESTION PRESENTED

Whether 20 U.S.C. § 954(d)(1) (1994), which imposes the criteria of "general standards of decency and respect for the diverse beliefs and values of the American public" on a National Endowment for the Arts funding program designed to support a diverse range of private expression, is unconstitutionally viewpoint-based and vague.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-371

NATIONAL ENDOWMENT FOR THE ARTS, et al.,

Petitioners,

— v. —

KAREN FINLEY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF VOLUNTEER LAWYERS FOR THE ARTS AND VARIOUS ARTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici Volunteer Lawyers for the Arts, Albany/Schenectady League of Arts, Inc., Mid America Arts Resources, Northwest Lawyers and Artists, Inc., and Toledo Volunteer Lawyers for the Arts are not-for-profit organizations that provide legal and educational services to artists and art organizations with limited financial resources. *Amicus* New York Artists Equity Association, Inc. is a not-for-profit support organization and a resource network, which educates visual artists. Some of the *amici*, as well as many of the artists and organizations they serve, receive funding from the National Endowment for the Arts. *Amici* Arena Stage, Chicago Symphony Orchestra, Los Angeles County

Museum of Art, and Walker Art Center are prominent not-for-profit visual, musical, theatrical and dance institutions throughout the United States, all of which receive, and some of which depend upon, funding from the National Endowment for the Arts. These organizations were founded and exist because they believe in the importance of fostering the creation, preservation, and presentation of art in a democratic society.

Amici urge the Court to affirm the decision of the Ninth Circuit that 20 U.S.C. § 954(d)(1) violates the First Amendment. *Amici* submit this brief to emphasize that art should receive the most stringent First Amendment protection because of its vital role in challenging the status quo, and that Congress's decision to limit funding by the National Endowment for the Arts in section 954(d)(1) to "general standards of decency and respect for the diverse beliefs and values of the American public," manipulates, and thereby chills, the marketplace of expression. Section 954(d)(1) violates the First Amendment.

The *amici* have obtained and filed the written consents of the parties to the filing of this brief pursuant to Rule 37(3)(a) of the rules of this Court.

SUMMARY OF ARGUMENT

This Court has not often had the opportunity--presented here--to rule on the place of art in the First Amendment's pantheon of freedoms. Art plays a distinctive and irreplaceable role in society. By posing new world views, art challenges status quo assumptions and thus checks the potentially propulsive power of social institutions, including the power of government. Because of art's inherently challenging qualities, the manipulation of the marketplace of art has long been a hobby of tyrannical governments, and a temptation of democratic governments.

Liberty is most secure when the marketplace of speech is vigorously protected from government control. Unquestionably,

the government[1] has the ability to manipulate that marketplace when it exercises the enormous power of its purse. To check that power, the First Amendment requires the government, when it acts as a financier in the marketplace of art, to act neutrally to ensure the preservation of a marketplace of expression that is "uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The law at issue in this case, 20 U.S.C. § 954(d)(1) (1994), limits the money paid by the National Endowment for the Arts ("NEA") to those artists who propose works that meet "general standards of decency and respect for the diverse beliefs and values of the American public." It was enacted solely because public officials oppose the world views posited by certain artworks, and it chills the marketplace of artistic expression by discriminating between viewpoints.[2] *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Section 954(d)(1), which skews artistic incentives toward particular views favored by Congress, discriminates against plainly legitimate artistic themes. Section 954(d)(1) contravenes the First Amendment and should be invalidated.

---

[1] This case involves only the First Amendment's limitations on the federal government's financing of the art marketplace. Whether the states labor under similar restraints under the Fourteenth Amendment's due process clause, which incorporates the First Amendment, is not under review.

[2] This brief limits its argument to the role of art in a democratic society and to the viewpoint discriminatory aspects of section 954(d)(1), but it is worth noting that the vagueness of the law "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 117 S. Ct. 2329, 2344 (1997) (invalidating Communications Decency Act's prohibition on sending "indecent" communications by means of telecommunications devices to persons under age 18).

ARGUMENT

I. ART PLAYS A PIVOTAL ROLE IN THE ACHIEVEMENT OF LIBERTY IN OUR CONSTITUTIONAL SCHEME

Like religion and philosophy, art is a counterweight to government's hegemony. Because art, even nondiscursive and abstract art, can challenge existing world views, it provides the governed the power to question entrenched institutions. Art's power is evident in the history of government attempts to coerce the art marketplace by defining permissible versus forbidden artistic expression. This history is pronounced in totalitarian societies, and not absent from our own. *See, e.g.*, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 331, 110 Stat. 1321-209 (1996) (prohibiting NEA funding any work that "denigrates the religious objects or religious beliefs of the adherents of a particular religion, or depicts or describes, in a patently offensive way, sexual or excretory activities or organs").

A. Art's Challenge Capacity

Art has the unique capacity to evoke an experience never had, a world never seen. In Henry James' words, "a work of art . . . makes it appear to us for the time that we have lived another life--that we have had a miraculous enlargement of experience." Henry James, *Theory of Fiction* 93 (James E. Miller, Jr. ed., 1972). It therefore provides a depth of understanding that purely didactic speech cannot. Wolfgang Iser, *The Act of Reading: A Theory of Aesthetic Response* 70 (1978). By conjuring up a reality not previously perceived, art poses a challenge to its participant's existing perceptions of life, power, and reality. Although art may convey an explicit and readily comprehensible message, its challenge function also lies in its ability to communicate nondiscursively. Unlike didactic speech, art permits the participant to *experience* a different world without cost and

without risk. *See generally* Marci A. Hamilton, *Art Speech*, 49 Vand. L. Rev. 73 (1996).

Art does not simply provide a single moment of aesthetic bliss but rather turns us away from one reality to a new reality. Each of us lives with particular views of the world. Whether literary, visual, auditory, or kinaesthetic, artistic works turn the familiar into the unfamiliar and vice versa. The encounter with an artistic work drives a wedge into a previously closed mental system by compelling the participant to re-examine and reinterpret preconceptions.[3] Therein lies art's power, its threat to the status quo, and its value in a democratic society.

Art's power does not always reveal itself at the moment the artwork is perceived. Most of us have read literary works in our youths that, at the time of the encounter, appeared to have little relevance in our limited sphere. Yet, we have carried the work with us for years, not knowing that it would change our lives or our views at a later date. The value of art lies not merely in our first experience of it, but also in its capacity to be a future, potent, and immanent tool of critique. *See* Hamilton, *supra*, at 96. Because of its latency, the power of any one artistic experience is immeasurable over the course of a lifetime. A diverse store of artistic experiences provides an invaluable arsenal to protect against the "bewitchment of one's common sense" by society's potent and prevailing powers, including those of the government. *Id.*

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[3] A striking recent example is how Matthew Bourne's "Swan Lake," which casts bare-chested males as swans (including the lead swan in black leather) and explores the prince's Oedipal longings for his mother, shook the foundations of traditional ballet. Bourne's work met with severe criticism, as well as acclaim. *See, e.g.*, Christopher Bowen, *Matthew Bourne: Giving the Classical a Shot of Irony*, Dance Magazine, May 1, 1997, at 52. This new take on an accepted icon in the ballet "has taught us not only to see but also to hear the ballet differently." Chris Pasles, *Dance Review Idealism and a "Cruel World" from American Ballet Theatre*, L.A. Times, Aug. 1, 1997, at F26.

It follows from the nature of art that those who hold power, including those in the government, have strong incentive to structure the marketplace of art and to use specific art to their own ends.

B. The Power of Art's Challenge Function Is Evidenced by Governmental Attempts To Impede Its Effect

Art's capacity to threaten entrenched power structures is documented in the repeated attempts by totalitarian governments to suppress art. As an extreme example, witness Nazi Germany. What stands between the experience with art in the United States and that in Nazi Germany is the extraordinary success of our constitutional scheme in curbing the temptation to manipulate the marketplace of expression, including art.

In aid of its efforts to purge itself of those deemed racially impure, Nazi Germany censored all art that would not assist Hitler's ideological goals, and exercised control over the distribution of art in order to control the emotions of the people. *See* 143 Cong. Rec. H10,943 (daily ed. Nov. 13, 1997) (statement of Rep. Leach) ("The Nazis purged state museums of impressionist, abstract, expressionist, and religious art as well as art they deemed to be politically or racially incorrect."). *See also Menzel v. List*, 267 N.Y.S.2d 804, 806 (Sup. Ct. 1966), *modified on other grounds*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd on other grounds*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969) (deciding an action to recover confiscated Chagall painting designated by Nazis as example of "decadent Jewish art"); Ian Dunlop, *The Shock of the New* 224-59 (1972) (describing the Nazis' confiscation of hundreds of modern masterpieces, including works by Picasso, Chagall, and Gaugin, and displaying them in an "Exhibition of Degenerate Art"). Art not consistent with the Nazi ideology was labelled "degenerate," and its creators were banned or put to death. *See* John von Rhein, *And the Banned Played on: London's "Entartete Musik" Recordings Are Reviving Works the Nazis Loved To Hate*, Chi. Trib., Oct. 26, 1997, at 19;

Andrew Fisher, *Perspectives: A German Celebration of "Degenerate" Art*, Fin. Times, July 20, 1996, at 3.

The 1937 *Entartete Kunst* (Exhibition of Degenerate Art), which later toured the United States in 1991, was Hitler's instrument to rouse the public against so-called "degenerate" art and artists. "Part of the purpose of *Entartete Kunst* was to undermine the authority not just of well-known artists but of existing institutions of art." Matthew Collings, *Resistance Heroes of Art*, The Guardian, May 20, 1992, at 38. *See also* William D. Montalbano, *Art in a Totalitarian Age; Exhibit Explores the Warping of Creativity During the '30s and '40s*, L.A. Times, Nov. 19, 1995, at A4 (commenting that exhibit entitled "Art and Power: Europe Under the Dictators, 1930-45" demonstrates how during the 1930s "culture was such a pronounced battleground for competing ideologies that it left artists, architects and filmmakers as uncomfortable pawns").

> What drew the millions to Entartete Kunst was the revelation in a highly compressed, spectacularised form of a certain negative ideal. The Nazis claimed that . . . [what] brought the Jews to Germany as well as intellectuals, homosexuality, whores, pacifism, communism, inflation and negro jazz music, were clearly figured in the distortions, disharmony and unnatural colours of modern art.
>
> Just as degenerate art could be weeded out and eventually destroyed--to be replaced by good, pure art by German artists approved by Hitler--so could degenerate elements of society be combed out of the body of the German volk.

Collings, *supra*, at 38.

In testimony to the power of art, Nazi Germany not only suppressed artistic expression by banning numerous works, but also used specific artists' works to convey its own message. *See*

Fisher, *supra*, at 3 ("The Nazis would only tolerate artists and officials who conformed to their views of Aryan art which glorified hard work, nationalist dedication, healthy outdoor pursuits and racial purity."); Walter Goodman, *Too Brilliant for the World's Good*, N.Y. Times, July 5, 1995, at C20 (stating that when Hitler asked Leni Riefenstahl to document a Nazi party rally, which resulted in the documentary "Triumph of the Will," he "did not want a political film; he wanted an artistic film"). By extinguishing "degenerate" art, Nazi Germany effectively eliminated the challenge that it could pose to the Nazis' favored art.

Similarly, the "thought reform" or "persuasion" experiments in China attempted to eradicate a panoply of art forms for the purpose of securing the power of the ruling elite. "All information from the West [was] censored and all unorthodox ideas [were] excluded from the carefully co-ordinated complex of media." Edgar H. Schein et al., *Coercive Persuasion: A Socio-psychological Analysis of the "Brainwashing" of American Civilian Prisoners by the Chinese Communists* 46 (1961).

The same impulse was evident in the Eastern bloc countries. For decades, the citizens of Eastern Europe lived under oppressive government (and political party) structures that suppressed and marginalized art and artists.

> Freedom of public expression [was] inhibited by the centralized control of all the communication media and of publishing and cultural institutions. No philosophical, political or scientific view or artistic activity that departs ever so slightly from the narrow bounds of official ideology or aesthetics [was] allowed to be published. . . no open debate was allowed in the domain of thought and art.

Id. app. at 218. Eastern European governments attempted to control art because it was a societal force that permitted the people to see beyond the oppression prevalent in their daily lives. *See, e.g.*, Shermakaye Bass, *A Man of Art and Letters*, Dallas Morn. News, Jan. 31, 1995, at 1C (quoting mail artist John Held, Jr.'s observation that "'mail is the way people in Eastern Europe were finding out about Western culture and art in the '60s, '70s and '80s . . . [and] it was through the hope people got through mail art contacts that [communism] toppled'").

Suppressed artists and their art paved the path to liberty in Eastern Europe. *See* Jiri Ruml, *Who Really Is Isolated, in The Power of the Powerless: Citizens Against the State in Central-Eastern Europe* 181 (Paul Wilson trans., John Keane ed., 1985) (stating that the Czech reform movement was peopled by "actors banned from acting, singers and musicians condemned to silence, . . . writers and academics forbidden to publish, . . . [and] artists with no opportunity to exhibit," among others); Charles Champlin, *The Blessings of Liberty*, L.A. Times, Dec. 28, 1989, at F1 (observing the significant role of artists in the fall of Communism, and comparing the role of Eastern European writers with that "played by Tom Paine and other firebrands of freedom in the American Colonies immediately after 1776"); John Russell, *Tyrants Fall; Art Endures*, N.Y. Times, Feb. 18, 1990, § 2 (Arts and Leisure), at 1 (citing specific instances of how "the novelist, the playwright, the poet, the composer, the movie maker and sometimes the painter or sculptor have been chipping away ever since the end of World War II at the monolithic political structure"). The Eastern bloc learned the hard way that which is enshrined in our constitutional structure: dissenters must be permitted to speak and be heard, or their suppressed energies can erupt into revolution.

The American experience itself teaches that art plays an essential and constructive role in fomenting change and challenging accepted wisdom. Abraham Lincoln acknowledged art's power to challenge powerful social forces when he met Harriet Beecher Stowe, the author of *Uncle Tom's Cabin*, and remarked "[s]o this is the little lady who made this big war." Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* 3 (1962). Our art, particularly our music and

films, have had tremendous impact outside our borders in fighting against totalitarian governments. *See, e.g., All Things Considered,* Oct. 31, 1997, *available in* 1997 WL 12834175 (interviewing Chinese piano player who told of his father, an opera singer, who was prohibited from performing Western opera, and further noting that Rock and Roll in the early 1980s was a "major influence to Chinese young people. . . [T]hat's the way they try rebelling [against] the government"). Yet, despite United States' artists' contributions to the world, censorship and viewpoint discrimination are not unknown in this country. *See* Marilyn J. Flood, *Lyrics and the Law: Censorship of Rock-and-Roll in the United States and Great Britain,* 12 N.Y.L. Sch. J. Int'l & Comp. L. 339, 400-24 (1991); *see also United States v. Two Obscene Books*, 99 F. Supp. 760, 762 (N.D. Cal. 1951) (concluding that Henry Miller's *Tropic of Capricorn* and *Tropic of Cancer* could be excluded from the United States by Customs officials), *aff'd sub nom. Besig v. United States*, 208 F.2d 142 (9th Cir. 1953); *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 183-84 (S.D.N.Y. 1933) (rejecting government's contention that James Joyce's "preoccupation with sex in the thoughts of his characters" rendered *Ulysses* subject to forfeiture and destruction), *aff'd sub nom United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934); *Commonwealth v. Friede*, 271 Mass. 318, 323, 171 N.E. 472, 474 (1930) (affirming criminal conviction for the sale of Dreiser's *American Tragedy*).

The temptation to encourage some world views through art and not others is pronounced in totalitarian regimes, but certainly not peculiar to them. Even in the United States, our representatives have succumbed to this temptation. In 1996, the Congress limited funding of new artworks through the NEA to prohibit funding any work that "denigrates the religious objects or religious beliefs of the adherents of a particular religion, or depicts or describes, in a patently offensive way, sexual or excretory activities or organs." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 331, 110 Stat. 1321-209. *See also* 143 Cong. Rec. S9348 (daily ed. Sept. 15, 1997) (proposing amendment, which was subsequently rejected, again to include

this language in the 1998 appropriations legislation); 143 Cong. Rec. H4699 (daily ed. June 26, 1997) (statement of Rep. Souder) (noting "NEA funding of obscene and anti-Christian art"); 139 Cong. Rec. E2330 (daily ed. Sept. 30, 1993) (statement of Rep. King) (criticizing art funded by the NEA that is "anti-Christian, obscene, and blatantly political"); 137 Cong. Rec. S13,267-68 (daily ed. Sept. 19, 1991) (statement of Sen. Helms) (referring to "the degenerate so-called 'art' that the NEA has in fact supported with public funds").

In the American constitutional scheme, the First Amendment exists to squelch such impulses. This Court bears the responsibility for drawing the line on such impulses.

C. The First Amendment Ensures That Art Is a Counterweight to the Federal Government's Hegemony

One telling hallmark of a free society is the "'breathing space'" afforded art. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)). While art always has the potential to bring government to account, societies can be measured according to the extent they permit art to wield its singular power in the polity. The First Amendment ensures that art can fulfill its liberty-reinforcing role in the United States.

The First Amendment proceeds from the position that any form of censorship, whether accomplished through a complete ban or through viewpoint discrimination, disrupts the marketplace of expression to the detriment of the polity and the people. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through

free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs . . . sets us apart from totalitarian regimes.") (citation omitted); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from [the overthrow of government], the more imperative is the need to preserve inviolate the constitutional right[] of free speech . . . to maintain the opportunity for free political discussion . . . ."). The First Amendment's free speech guarantee prevents the federal government from co-opting or coercing the marketplace of expression. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right."); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of the government.") (citation omitted); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). These bedrock First Amendment principles apply to art in all of its forms. *See* Hamilton, *supra*, at 102-12 (discussing the First Amendment's protection of all forms of art, including the nondiscursive and nonrational, because art's communication capacity is not limited to or dependent upon rational faculties); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably

shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll.") (citations omitted); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment.").

Along with religion and philosophy, art is a hedge against ideological totalism. In the words of President Kennedy, "'[w]hen power leads man toward arrogance, poetry reminds him of his limitations. When power narrows the areas of man's concerns, poetry reminds him of the richness and diversity of his experience. When power corrupts, poetry cleanses, for art establishes the basic human truths which must serve as the touchstones of our judgment.'" Champlin, *supra*, at F1 (quoting President Kennedy in context of discussing artists' role in the downfall of Communism in Eastern Europe). A multiplicity of world views, and the capacity of individuals to test differing views, arms citizens as they face the prevailing powers in the society and in government. The American constitutional scheme recognizes the value of the individual and aims to protect a thriving marketplace of expression for the purpose of preventing the tyranny feared by the Framers. The marketplace of new and emerging artworks plays a vital role in keeping that tyranny at bay.

II. THE FEDERAL GOVERNMENT, ACTING AS A FINANCIER IN THE MARKETPLACE OF ART, HAS VIOLATED THE FIRST AMENDMENT BY FAILING TO ACT NEUTRALLY AND DISCRIMINATING BETWEEN ARTISTIC THEMES

Although the federal purse can be used to benefit the public, it can also be employed as a weapon to coerce the American polity. *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987)). Much of this Court's First Amendment jurisprudence indicates that the opposite of coercion is neutrality. For example, the neutrality principle has been cited frequently in this Court's First Amendment Religion Clause jurisprudence. *See, e.g., Rosenberger v. Rector and*

Visitors of the Univ. of Va., 515 U.S. 819, 839-44 (1995); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696-97 (1994); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-14 (1993); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533-35 (1993); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 878-79 (1990); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 745-54 (1976). At the same time, this Court has identified a neutrality requirement in its First Amendment Speech Clause cases. *See Rosenberger*, 515 U.S. at 833-34 (requiring neurtrality when government expends funds "to encourage a diversity of views from private speakers"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *see also Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)) (observing that the government may not deny subsidization to certain forms of speech so as to "'ai[m] at the suppression of dangerous ideas'"). This case invites the Court to take the next logical step, and to declare that art speech, like religious speech, is protected against government attempts to favor some views over others.

The First Amendment prohibits the government from using the power of the purse adversely to manipulate First Amendment interests, whether those interests are religious, political, or artistic. Thus, when a constitutional challenge is raised to the federal government's actions in the marketplace of artistic expression, the appropriate question under the First Amendment is whether the government has acted neutrally.

A. When the Government Acts As an Arts Financier, It Must Act Neutrally

Federal government decisions to fund the creation of new works of art by pouring funds into the otherwise private market of art, cast the government as a financier in the open market. Acting

as a financier, the government has the capacity to affect the mix of new works to be created. Its actions in this role, therefore, demand close First Amendment analysis. *Rosenberger*, 515 U.S. at 833-34 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)) (recognizing that when the government "appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes," but when the government "expends funds to encourage a diversity of views from private speakers," the government must act neutrally). *Cf.* 20 U.S.C. § 953(b) (1994) ("The purpose of the [NEA] shall be to develop and promote a broadly conceived national policy of support for . . . the arts in the United States . . ."). To avoid the detrimental market-structuring of which the government is capable and to which it is tempted, the government-financier must base its funding decisions on neutral principles.

B. Section 954(d)(1) Is Not Neutral and Therefore Violates the First Amendment.

Under the law at issue in this case, which governs the way in which the NEA distributes government money to artists in the open market, the government is acting as a financier in the marketplace of new art.[4] While private financiers have the right to fund only the art they like, the First Amendment places restrictions on the federal government's operation in the marketplace of art because of the obvious danger that the government may skew the marketplace toward particular viewpoints and thereby chill other, important and challenging viewpoints. Unlike the chilling of other forms of expression, the chilling of art endangers not only suppression of its explicit message, but also that of its noncognitive aspects, which may be just as potent in challenging entrenched institutions and unexamined, widely accepted viewpoints.

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[4] The term "new art" includes new productions of existing works, as well as the creation of new works. Of course, plenty of existing works, such as "Lolita," would not meet the decency standard of section 954(d)(1).

Neutrality is the touchstone for constitutional inquiry when the federal government acts as arts financier in the open market for art. *See Rosenberger*, 515 U.S. at 839. *Cf. Church of the Lukumi Babalu Aye*, 508 U.S. at 533-34 (defining neutrality in the religion context); *Employment Div., Dep't of Human Resources*, 494 U.S. at 878-79 (stating that valid and neutral laws of general applicability do not violate the Free Exercise Clause). Section 954(d)(1) requires the government to take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" in judging artistic merit. By limiting arts grants to those that satisfy the standards of morality codified in section 954(d)(1), Congress intended to favor some viewpoints--those the government approves--over others. *See Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (citing *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950)). Section 954(d)(1) violates settled First Amendment principles by shifting market preferences toward specific artistic themes and away from others. "'A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law . . . abridging the freedom of speech."'" *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984) (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 546 (1980)) (Stevens, J., concurring in judgment).

Section 954(d)(l) would require the NEA to engage in viewpoint discrimination, and thus coerce the mix of expression that appears in the arts marketplace.[5] It is an attack on the liberty that is engendered by an "uninhibited, robust, and wide-open" marketplace of art. *New York Times Co.*, 376 U.S. at 270. The constitutional defect of the selective funding at issue here is not outright suppression; the federal government has not decreed that certain artworks must be banned. Rather, the government has, in

[5] The district court in *Finley* enjoined section 954(d)(1) finding it vague under the Due Process Clause and overbroad under the First Amendment. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1476 (C.D. Ca. 1992), *aff'd*, 100 F.3d 671 (1996), *cert. granted*, 118 S. Ct. 554 (1997).

its role as participant in, and leader of, the arts marketplace, skewed the market away from certain works--those that do not reflect the "general standards of decency" or that do not express "respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1).[6] With these requirements, the government is endorsing particular aesthetic viewpoints and condemning others.[7] This is evident not only in the text of the law but also in its legislative history.[8]

[6] The Painted Bride Art Center in Philadelphia was established to showcase avant-garde work. In response to the tenor of federal and private funding, the Bride attempted to recast itself as a community arts outreach program. The realization that it had forsaken its artistic mission for the government's political mission persuaded the Bride to forgo government funding. *See* Stephan Salisbury, *The Painted Bride's Going Fiscally Lean As It Zeroes in on Its Artistic Mission Center To Shift Focus from Community Outreach To Presenting Cutting-Edge Work*, Phila. Inq., Sept. 25, 1995, at D01.

"The art world's version of affirmative action . . . [has] had a profoundly corrosive effect on the American arts--pigeonholing artists and pressuring them to produce work that satisfies a politically correct agenda rather than their best creative instincts." Jan Breslauer, *The NEA's Real Offense: Agency Pigeonholes Artists by Ethnicity*, Wash. Post, Mar. 16, 1997, at G01.

[7] *See, e.g.*, 143 Cong. Rec. S9478 (daily ed. Sept. 17, 1997) (statement of Sen. Ashcroft) ("[T]he 'Blood of the Mugwump' volume is one which is frankly so repugnant to the values of America--it talks about a clan of Catholic, gender-shifting vampires who get infections, viruses, by reading prayer books. . . . I really cannot imagine this is the kind of thing we want to suggest to the American people."); 136 Cong. Rec. H9420-21 (daily ed. Oct. 11, 1990) (remarks of Rep. Marlenee) (stating that proposed NEA legislation was a smokescreen to permit "the junkies to continue to peddle their depraved and sadistic wares with impunity," and refusing to attach his name "as a patron to a legacy of art that is degenerate, obscene, perverted, pornographic, and exceedingly offensive").

[8] "Previous floor debate in support of content restrictions in both the House and Senate clearly suggests that its proponents are seeking to restrict support for projects which involve certain subjects and issues, approaches to topics, points of view, and groups of individuals." 139 Cong. Rec. S11,670 (daily ed. Sept. 14, 1993) (reading, into the record, materials prepared by congressional staff for responses to possible floor amendments pertaining to NEA funding).

C. The Impact of Section 954(d)(1) on the Marketplace of Art Is Potentially Enormous

The impact of section 954(d)(1) is potentially enormous. If the government finances only those works that are decent and that express respect for diversity, it disfavors a vast array of valuable and important works. This poses a substantial risk to the marketplace of art. Because society's views on decency and diversity are typical fodder for any artist's mill, the federal government has discriminated against a remarkable array of artists and their works. Indeed, the importance of art in a democracy is that it has the capacity to bring seemingly settled presuppositions into a new and perhaps unforgiving light. *See supra*. These standards, if in effect, would exclude works by renowned authors and artists who have plumbed the depths of human existence by revealing and dissecting humanity's less than noble instincts, including Marcel Duchamp, Martha Graham, Henry James, James Joyce, Balthazar Klossowski de Rola (Balthus), Edouard Manet, Henri Matisse, Henry Miller, Vladimir Nabokov, Eugene O'Neill, Pablo Picasso, Aleksandr Solzhenitsyn, Anna Sokolow, Mark Twain, and the impressionists of the 1870s.

Because private funding of the arts often follows the NEA's choices, the effect on the art market of this coercive element is much greater than the government has admitted.[9] *See* Brief for

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(..continued)

> [T]he debate which we are about to embark upon is a debate about whether the Federal Government should subsidize art and should identify in the art community some things for subsidy and some things for special treatment and some things to be singled out for approval while other things have to survive or fall based on their quality in the marketplace.

143 Cong. Rec. S9465 (daily ed. Sept. 17, 1997) (statement of Sen. Ashcroft).

[9] Because private funding tends to be relatively conservative,

Petitioner, *National Endowment for the Arts v. Finley*, No. 97-371, 1998 WL 11935, at *38 n.12 (U.S. Jan. 9, 1998) ("The NEA's funding program is unlikely to [manipulate or skew the marketplace of ideas] because it provides only a small fraction of the total available funding for the arts."). As an empirical matter and as a result of the NEA's funding structure, the federal government's funding decisions lead and influence private funding decisions.[10] In a world of scarce resources, artists will

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(..continued)

government funding operates as a funnel for the scope of works in the marketplace. *See* Nadine Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* 103 (1995) ("Support from the NEA has served as a seal of approval for art, which in the past had been seen as a 'safe' investment or contribution for conservative corporate and individual donors."). *See also* 143 Cong. Rec. S9328 (daily ed. Sept. 15, 1997) (statement of Sen. Bennett) ("The National Endowment for the Arts is something like a 'Good Housekeeping Seal of Approval' put on a local effort which allows the people . . . to . . . say 'You see what we have here is really a class operation. It's worthy of your support, worthy of your private contributions . . . .'"); 141 Cong. Rec. S11,986 (daily ed. Aug. 9, 1995) (statement of Sen. Abrahams) (maintaining private arts funding levels requires a "national entity" that provides a "national imprimatur"); 131 Cong. Rec. H7736 (daily ed. Sept. 24, 1985) (statement of Rep. Jeffords) ("[S]upport from the Endowment[] has always represented a 'Good Housekeeping Seal' of approval which has helped generate non-Federal dollars for projects and productions.").

[10] *See, e.g.*, 143 Cong. Rec. S9476 (daily ed. Sept. 17, 1997) (statement of Sen. Feinstein) ("Every $1 spent by the NEA attracts $12 to the arts from other sources.").

NEA funding of a given project necessarily precipitates funding from other sources because the NEA can only grant up to 50% of the total cost of a project or production to groups, public agencies, and private nonprofit organizations. 20 U.S.C. § 954(e), (p)(3) (1994). *See* Norm Brewer, *Senate a Friend to NEA: No Funding Halt*, Chi. Sun-Times, Sept. 18, 1997, at 27 ("State arts councils oppose increasing block grant money because projects endorsed by the NEA can generate more matching funds from the private sector."); Breslauer, *supra*, at G01 ("[T]he role of the NEA, paradoxically, is both to follow and to lead private funders. All NEA grants must be matched by private money--and yet the NEA won't actually release a grant until it is assured that the private funds are forthcoming.").

craft their proposals, and therefore their artworks, to receive the money available.[11] The negative effect of section 954(d)(1) is further magnified by the NEA's practice of considering a funding applicant's prior work before awarding a grant. Joint App. 18, 74, 81. Thus, if an artist has any present or future plans to submit a grant proposal to the NEA, the judgment of section 954(d)(1) would mold all of the artist's creative work.

At the present time, approximately five percent of the arts funding in the United States, slightly less than $100,000,000, comes from the NEA. This sum, in turn, influences private funding by twelve-fold, so that more than $1.3 billion dollars induces artists to make their works consistent with "general standards of decency" and respectful of the "diverse beliefs and values of the American public."[12] These standards invite mediocrity, blandness, and homogenization, while discouraging

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(..continued)

The district court indicated that the matching requirement likely violates the Constitution because section 954(d)(1) affects not only NEA decisions, but also the decisions of the private entities providing the matching funds.

> An argument can be made that the decency clause constitutes a facially unconstitutional condition with respect to groups, agencies, and non-profit organizations that receive NEA funding. Because the NEA is permitted to fund only up to 50% of the total cost . . . any statutory content control over an NEA-supported program or project necessarily imposes restrictions over a substantial proportion of non-NEA-funded expression. However, as the NAAO have not raised this argument, the court does not address or resolve it.

Finley, 795 F. Supp. at 1472 n.18.

[11] *See supra* note 5, for examples.

[12] 143 Cong. Rec. S9488 (daily ed. Sept. 17, 1997) (statement of Sen. Hutchinson).

creative cutting-edge work. This is not good for art, it is not good for the American people, and it violates the First Amendment's injunction to preserve a robust marketplace of expression.

The coercive effect of section 954(d)(1) would, if in effect,[13] increase as the amount of NEA funding increases. The increase in funding proposed by the President's Committee on the Arts and Humanities, if subject to section 954(d)(1), would increase section 954(d)(1)'s direct coercive impact on artists and its reverberations through private funding sources markedly.[14] Section 954(d)(1)'s untoward impact on the arts market surely will be aggravated if and when the current nominee to head the NEA, who has vowed to increase funding at least five-fold, is confirmed.

While the law at issue in this case is not a complete ban on any artistic perspective, it chills art speech in a way destructive of the marketplace of artistic expression. *Cf. Reno*, 117 S. Ct. at 2344 (referring to law that "raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Rosenberger*, 515 U.S. at 835 (recognizing the danger "to speech from the chilling of individual thought and expression"). For this reason, section 954(d)(1) should be stricken and Congress should receive the message that it may not, through the exercise of its purse, coerce, chill, or manipulate the marketplace of emerging artworks that are so crucial to checking government power.

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[13] *See Finley*, 795 F. Supp. at 1476 (enjoining operation of section 954(d)(1)).

[14] "Creative America: A Report to the President," which was requested by the White House and organized by the President's Committee on the Arts and Humanities, including NEA head nominee, William Ivey, suggested that Congress increase spending for the arts and humanities from its present level of $.88 per person to $2 per person by the year 2000. Jacqueline Trescott, *Presidential Panel Calls for Doubled Cultural Funding: Report Also Recommends Private Sector Initiatives*, Wash. Post, Feb. 26, 1997, at D01. This could amount to over $500,000,000. *Clinton Asks Musicologist To Take Baton at the NEA: Arts Agency Nominee Has Nashville Roots*, Chi. Trib., Dec. 20, 1997, at 14.

CONCLUSION

The First Amendment prohibits the federal government, when it acts as a financier in the marketplace of art, from viewpoint discrimination. Section 954(d)(1) chills art speech by elevating some artistic viewpoints above others and therefore should be invalidated. The decision of the Court of Appeals should be AFFIRMED.

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NATIONAL ENDOWMENT FOR THE ARTS,
Petitioner

v.

KAREN FINLEY, ET AL,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of Amici Curiae The American Association of University Professors The American Council of Learned Societies The College Art Association The Association of American University Presses The National Humanities Alliance The Thomas Jefferson Center for the Protection of Free Expression

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STATEMENT OF INTEREST

This brief amicus curiae[1] is filed in support of appellees on behalf of the American Association of University Professors, the American Council of Learned Societies, the College Art Association, the Association of American University Presses, the National Humanities Alliance, and the Thomas Jefferson Center for the Protection of Free Expression. These organizations share an abiding commitment to academic freedom and to the free exchange of ideas in scholarly and creative work. Collectively, the amici represent virtually the entire community of scholarship in the arts and humanities, as well as the social sciences. Descriptions of the amici and, in two cases, a roster of their constituent organizational members, may be found in the Appendix.

All the amici share a deep concern with the creation and preservation of an environment of artistic, intellectual, and academic freedom in American society. Amici are strongly opposed to the government's position in this litigation, which supports content-based restrictions on government funding. Many of the amici, and their members, are direct recipients of federal funding.

Founded in 1915 to defend academic freedom, the

[1]This brief amici curiae is filed with the consent of the parties and was authored by the counsel for amici. Only amici contributed to the financial costs of preparing and submitting this brief.

American Association of University Professors is an organization of over 40,000 faculty members and research scholars in all the academic disciplines and is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. The association has taken a special and growing interest in assaults on the creative freedom of artists in higher education. (*See* App. 1a.)

The American Council of Learned Societies, by action of its Board of Directors, joins in this brief in defense of academic freedom. The ACLS is a federation of 60 national scholarly organizations in the humanities and related social sciences. Founded in 1919, the ACLS supports scholarship through an extensive program of fellowships and grants, represents the American scholarly community in this country and abroad, and sponsors scholarly exchanges with many parts of the world.

The College Art Association represents 2,000 institutions of higher education and museums, as well as 13,000 individuals concerned with scholarship, teaching, and practice in the visual arts. Its members include individual artists, educators, historians, librarians, researchers, museum professionals, colleges and universities, university presses, state humanities councils, and a wide spectrum of scholarly and professional groups. CAA has benefited directly as a recipient of grants from the National Endowment for the Arts, including a challenge grant for its fellowship program and a grant for its annual conference.

The Association of American University Presses is a cooperative, nonprofit organization which promotes the work

and influence of university presses, provides cooperative services, and helps its members respond to the changing economy and environment. Formally established in 1937, the Association of American University Presses serves scholars and scholarship. Academic presses exist on the cutting edge of knowledge, and receive large subsidies from state and federal government.

The National Humanities Alliance is a coalition of organizations concerned with the impact of federal laws, regulations, and other actions that affect scholarship in the Humanities. NHA and its 85 members are vitally concerned with maintaining freedom of inquiry, the underlying basis of the humanities. The combined memberships of NHA member organizations is over 800,000 individuals.

The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan organization devoted solely to the protection of free speech and free press. The Center has, since its opening in 1990, pursued that mission in various forms, including the filing of amicus curiae briefs in cases involving a variety of free expression issues.

The rights of scholars, poets, novelists, artists, museum professionals, theatrical producers, filmmakers, dancers, choreographers, art historians, or philosophers to challenge conventional wisdom, values, and social pieties is a cornerstone of artistic and academic freedom, no less than the rights of scientists funded by the National Institutes of Health. Amici fear that, if public officials may grant or withhold government benefits on the basis of whether creative expression is deemed "decent" or "respectful," the

result will be to stifle the "free play of spirit which all who deal with words or images ought especially to cultivate." *Keyishian v. Board of Regents*, 385 U.S. 589, 601 (1967).

SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit correctly held that Congress acted unconstitutionally in requiring the National Endowment for the Arts [NEA], in making grants to artists, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." While it is clear that Congress may decline to provide support to individual artists, government's power to make no grants whatever does not imply unlimited authority to direct the terms and conditions on which grants may be allocated. The particular burden which Congress imposed in 1990 violates both freedom of expression guaranteed by the First Amendment and due process guaranteed by the Fifth Amendment. That conclusion should follow here no less clearly than it would if Congress had imposed restrictions on arts grants that disqualified Christians, Moslems, freethinkers, or any other category based on religious, moral, or ideological beliefs, values, or viewpoints.

This Court has consistently affirmed two premises which underlie the Ninth Circuit's judgment: That artistic expression is fully protected by the First Amendment, and that the safeguards of due process and free speech apply to the withholding or conditioning of benefits as they do to direct sanctions. Vague and imprecise language may gravely

chill expression when it governs a governmental grant-making process. Vague standards may also cause grantees to forego protected speech because they are genuinely uncertain about what the law does and does not cover.

Equally clear, though of more recent origin, is this Court's insistence that government may not use the denial of funding in a traditional sphere of free expression to suppress or disadvantage a particular viewpoint. The clear import of the challenged restrictions is to force the NEA to engage in just such selective funding -- allowing support of those artists whose works serve "general standards of decency" and foster "respect for diverse beliefs," while withholding funds from artists where doubt exists about their commitment to such vague desiderata. These restrictions thus involve a classic constitutional violation, as the court of appeals has held.

I. ARTISTIC EXPRESSION IS FULLY PROTECTED SPEECH, AND IS CLOSELY AKIN TO ACADEMIC FREEDOM.

This Court has consistently affirmed the constitutionally protected status of artistic expression. *See Miller v. California*, 413 U.S. 15, 34 (1973). The Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) articulated the basic values that are at risk in this case:

> Music is one of the oldest forms of human expression. . . . [R]ulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical

> compositions to serve the needs of the state. . . . The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication is protected under the First Amendment.

491 U.S. at 790. What is true of music is equally true of other visual and performing arts. This Court recently reaffirmed the rationale for protection of art as expression, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995):

> [A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message'. . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky of Lewis Carroll.

515 U.S. at 569. These principles are central to the judgments of both lower courts in this case. They have been fully accepted by other courts that have had occasion to test limits on legal control or restriction of artistic endeavor. "Artistic expression, no less than academic speech of journalism," declared the district court in this case, "is at the core of a democratic society's cultural and political vitality." *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1473 (C.D. Cal. 1992).

Not only does the First Amendment unmistakably protect artistic expression; the legislative history underlying the National Endowment for the Arts is no less protective. Among the Act's central values, declared by its framers,

were devoting "the fullest attention to freedom of artistic and human expression" and ensuring that "conformity for its own sake is not to be encouraged and that no undue preference should be given to any particular style or school of thought." *S. Rep.* No. 89-300, 89th Cong., 1st Sess. (1965); *see also 135 Cong. Rec.* S10374-01 (daily ed. Aug. 4, 1989) (statement of Sen. Pell). Congress departed from those guiding principles on at least two occasions -- by adopting the so-called Helms Amendment, declared unconstitutional in *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991), and in the "decency and respect" provisions that have been invalidated by two lower courts.

There are close and vital links of several types between the values that underlie artistic freedom and those inherent in academic freedom. First, a substantial portion of creative and performing artists are members of the academic community, holding faculty appointments on a full or part-time basis. The facilities in which their works are created, displayed and performed are, in turn, parts of the colleges and universities of our nation. Virtually all of those institutions of higher learning, both public and private, offer instruction to their students in many facets of the creative and performing arts -- instruction which depends directly and substantially upon the artistic freedom of those who teach in the arts. That tolerance is enhanced by the commitment that most such institutions, and the associations to which they belong, have made to the 1940 Statement on Academic Freedom and Tenure, sponsored by the American Association of University Professors, and often relied upon by courts in

academic freedom cases. *See* American Assoc. of Univ. Professors, *AAUP Policy Documents & Reports*, p.3 (1995 ed.)

Second, academic institutions have over the years sheltered and nurtured novel and imaginative endeavor in the arts. The campus studio and theater have for generations afforded a safe haven to avant garde artists. Had venturesome painters, composers and playwrights not been able initially to experiment within the academic setting, much artistic endeavor which eventually gained broad acceptance might never have come into being. The high level of tolerance that academic communities afford to the artist has been a critical element in developing creativity and innovation in the arts in this country.

Third, facilities for the creative and performing arts form a vital bridge between the college campus and the community in which it is located. Plays, recitals, concerts, and exhibits enrich in myriad ways the lives of those of those who are neighbors of academic institutions. The university museum or gallery, the college theater or auditorium, or the performing arts center, offers to many residents and neighbors the primary (if not the sole) contact with the academic community and campus life.

Fourth, with special relevance to the central issue of this case, a high proportion of grants to creative and performing artists have been made to persons within the academic community. Indeed, as the district court noted, NEA grants have often been made to artists and to museums, galleries, and other facilities within an academic setting. *Finley*, 795 F. Supp. at 1474. One of the very few grantees

to refuse NEA support in protest of the disclaimer oath (invalidated in *Bella Lewitzky*) was the University of Iowa Press. Though the grant had been sought to enable the Press to publish a collection of acclaimed poems, the certificate mandated by the Helms Amendment seemed both intrusive and incompatible with basic precepts of academic freedom and free inquiry. *See* Letter from Paul Zimmer, director of the University of Iowa Press to John Frohnmayer, chairman of National Endowment for the Arts (June 5, 1990) (discussing reasons for not accepting an NEA grant of $12,000).

To underscore this vital link between academic and artistic freedom, the district court cited with approval a passage from the statement issued at the close of the 1990 Wolf Trap Conference on Academic Freedom and Artistic Expression, endorsed by one of the amici:

> "[E]ssential as freedom is for the relation and judgment of facts, it is even more indispensable to the imagination." . . . Faculty and students engaged in the creation and presentation of works of the visual and the performing arts are engaged in pursuing the mission of the university as much as those who write, teach, and study in other academic disciplines. . . . Artistic expression in the classroom, studio and workshop therefore merits the same assurance of academic freedom that is accorded to other scholarly and teaching activities.

Finley, 795 F. Supp. at 1474. [The full text of this

Statement appears on page 1a of the Appendix.]

This Court has for four decades consistently stressed the centrality of academic freedom to First Amendment values -- from *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) to the relatively recent reaffirmation of that nexus in *Rust v. Sullivan*, 500 U.S. 173 (1991):

> [W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

Rust, 500 U.S. at 200 (citing *Keyishian*, 385 U.S. at 603, 605-606).

Most recently, in *Rosenberger v. Rector and Visitors of the University of Virginia*, this Court warned that "the danger . . . to speech from the chilling of individual thought and expression" is "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." 515 U.S. 819, 835 (1995).

Against this background of solicitude for academic freedom, the restrictions challenged here present an ominous prospect. For creative and performing artists in the academic community, the threat is obvious and immediate: A major source of potential funding for their creative endeavors has been confined to those who are willing to

adhere to "general standards of decency" and "respect for diverse beliefs and values." The conscientious academic artist simply has no way to determine what creative activity is, and what is not, acceptable to Congress or to the NEA under these vague and undefined clauses. Even less clearly could such an artist guide the work of his or her students, who might either be participants in a collaborative studio project, or be preparing to seek public support on their own.

Such concerns are not, however, confined to the arts. If such conditions may be imposed on NEA grants, there is no logical reason why government could not restrict any other program of public support to those scholars who exemplify "general standards of decency" and "respect for diverse beliefs and values." A judgment upholding the restrictions challenged here would apply with equal force to grants from the National Institutes of Health, the National Science Foundation, the National Endowment for the Humanities and myriad other federal agencies. Comparably imprecise and ominous language could, under such a precedent, be made part of the grant-seeking process across the board.

The NEA is unique in only one respect -- the controversial quality of the art works that provoked the Congressional ban now under challenge. If Congress may lawfully constrain scholarship in the manner it seeks to do here, that power would not stop with the creative and performing arts. If at some later time, Congress became exercised about unorthodox or disquieting research in the physical or social sciences or other areas of the humanities, federal support could equally be limited to those scholars

who agreed to observe "general standards of decency" in their laboratories. If the arts are this vulnerable today, why not biochemistry or sociology or legal history tomorrow? This is a truly frightening prospect -- yet one which follows with inexorable logic from the position the Government presses before this Court.

Such a prospect is anathema to everything this Court has said over four decades about the meaning and centrality of academic freedom. Thus to constrain the scholar's inquiry, by whatever means, poses precisely that "danger . . . to speech from the chilling of individual thought and expression" which this Court recently and eloquently found "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*, 515 U.S. at 835.

While artistic freedom is most acutely and immediately imperilled here, far more is at stake. If vague and unbridled restrictions like these could be imposed on public funding for academic research, no branch of scholarship would be immune. The district court and the court of appeals were thus correct in finding these restrictions violative of the constitutional liberty of those who seek government support for their creative endeavors.

II. THE COURT OF APPEALS PROPERLY INVALIDATED THE CHALLENGED RESTRICTIONS ON FIRST AMENDMENT AND DUE PROCESS GROUNDS.

The court of appeals correctly ruled that the key words in the challenged sections were so vague as to deny First Amendment and due process rights to artists whose expression those words governed. That court also correctly held that the language in question was no mere declaration of Congressional preference, but was clearly intended to control the allocation of scarce federal funds. Those conclusions reflected a close and careful study of the legislative history, as well as logical analysis of the relations between the original statute and the 1990 amendments. Petitioner renews here the contrary claims that both lower courts soundly and squarely rejected -- claims which would effectively render these amendments an idle exercise in legislative enactment.

Vague language, always inimical to free expression, is especially dangerous when it is applied to artistic endeavor. As the court of appeals warned, "the twin dangers of a vague law -- lack of notice and arbitrary or discriminatory application -- may chill the exercise of important constitutional rights." *Finley v. National Endowment for the Arts*, 100 F.3d 671, 675 (9th Cir. 1996). Those risks are especially severe for artists of the kind whose grants are in issue in this case. It was President Ronald Reagan who wisely observed: "Artists have to be brave; they live in a realm of ideas and expression, and their ideas will often be provocative and unusual. Artists stretch the limits of understanding." John Frohnmayer, *Talking Points for 1st Amendment Congress*, Kansas City, Mo., April 19, 1991.

The risks of uncertainty for those who engage in other forms of expressive activity transcend the creative and

performing arts. Indeed, the hazards of vague restraints may be even greater in other areas of scholarship. As this Court cautioned over forty years ago in *Sweezy v. New Hampshire*:

> No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust.

354 U.S. 234, 250 (1957). The immediate concern for giving artists adequate and meaningful guidance in sensitive matters extends well beyond the creative and performing arts. Few branches of scholarship do not share such concerns; few would be unaffected by such amorphous and elusive standards.

The language now being challenged before this Court is manifestly imprecise. The amendment in question contains no definition of either "general standards of decency" or "respect for the diverse beliefs and values of the American people." Neither phrase could remotely be thought a term of art, the meaning of which is well-known and obvious despite the absence of definitions within the amendment. Nor does either phrase in this statute have meaning comparable to the general standard which guides NEA grant-making, that of "artistic excellence." That phrase has acquired meaning both from long experience within the professional community of creative and performing artists, and from the presence of such artists on the panels that play so crucial a role in application of the statutory criteria.

There is nowhere in the NEA process, by contrast, either recognized expertise on "general standards of decency" or accumulated and recognized experience which might guide the interpretation and application of otherwise broad desiderata.

The use of somewhat similar language in other contexts also gives no meaningful guidance to NEA grantees. "Indecent," for example, was once sustained by this Court in a very limited application to licensed broadcasting, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), though with a more focused definition, and under vastly different conditions, as this Court noted just months ago in *Reno v. ACLU*, 117 S. Ct, 2329, 2341-42 (1997). Moreover, "general standards of decency" could hardly be equated with "indecent," even if the contexts were identical.

Much the same could be said of the other phrase -- "respect for the diverse beliefs and values of the American people" -- for the understanding of which the amendment also gives no guidance. However meritorious such a commitment might seem as a personal credo, it is a vastly different matter to give such a subjective precept the force of law, through an act of Congress that governs both a granting agency and the lives of its grantees.

Some months after the decision of the court of appeals, this Court's judgment in *Reno v. ACLU*, 117 S. Ct. 2329 (1997), reinforced and buttressed the vagueness ruling below. The language in issue here -- "standards of decency" -- is strikingly similar to the key term -- "indecent" -- which, this Court found (in the Communications Decency Act) "lacks the precision that the First Amendment requires when

a statute regulates speech." *Id.* at 2346.

Although "decency" and "indecent" have occasionally been allowed by courts for certain very limited purposes, the use of such language to control arts grants is far closer to Congress' ill-fated attempt to ban "indecent" material on the Internet. Here, as in the *Reno* case, "the scope [of the "decency" language] is not limited to commercial speech or commercial entities." *Id.* at 2347. Here, too, the statute's "open-ended prohibitions embrace all nonprofit entities and individuals" who may be engaged in protected expression. *Id.* In this case, quite as clearly as in *Reno*, "undefined terms . . . cover large amounts of nonpornographic material with serious educational or other value." *Id.* Here, just as in *Reno*, existing and defined prohibitions already address the dissemination of obscene material and child pornography. *Id.* at 2347 n. 44. Thus, the parallels are striking between these two Congressional uses of undefined terms which have so broad and ominous a reach over protected artistic expression.

There is one difference between these two uses of "decency." Restrictions on government support are not the same as direct criminal or even civil sanctions. Petitioner insists that difference is crucial. At one time, it might have been dispositive -- when only "rights" were protected, and "privileges" were ephemeral. Such a distinction has, however, long since ceased to define government's duty to respect First Amendment interests of those with whom it deals in important matters. Thirty five years ago, in *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court found

it already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." 374 U.S. at 404. Since that time, the First Amendment interests of government beneficiaries have been recognized in myriad contexts. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364 (1984).

The one recent case that might seem to dilute protection for the expressive rights of public beneficiaries is *Rust v. Sullivan*, 500 U.S. 173 (1991), in which this Court sustained a regulation that limited certain uses of federal funds by health facilities. The import of *Rust* is, however, narrow at best on the issues of this case. The restriction challenged there was directed not at the speech of individuals, but rather at government funding of private entities and persons to deliver the government's message. *Rust* clearly distinguished cases "in which the government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service." [emphasis in original] 500 U.S. at 197. That distinction reflected the reality that if only *organizational* activities are constrained, individuals associated with that organization remained (at least theoretically) free, on their own time, to enjoy the full range of First Amendment rights.

The realities of the creative arts do, however, provide a crucial contrast. Individual artists deemed ineligible for public funding are, only in the most theoretical sense, "free to pursue" creative activity on their own time. The reality is that government funding has been for many years a component in the total system of support for individual

artists, and a key source of leverage for private support in many forms. Thus any suggestion that an artist who is barred under these criteria from receiving federal funding is, like a staff member in a funded health facility, constrained in speech only to a limited extent, overlooks a crucial difference.

Whatever doubt might remain after *Rust* about government beneficiaries' First Amendment freedoms was put to rest by this Court's later decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). In striking down a public university's refusal to grant funds to student publications that advanced a religious view, the Court not only vindicated First Amendment interests of those who receive government funds, but also stressed the duty of government to allocate those funds in a viewpoint-neutral manner. Both principles are directly implicated here. Thus, while *Rust* dealt essentially with (and sustained conditions on) government speech, *Rosenberger* dealt instead with public funds for individual expression, on which such conditions are not acceptable.

In *Rosenberger*, the university relied unsuccessfully on a broad reading of *Rust*, urging deference to its judgments in dispensing scarce resources. The distinction between the two cases is crucial here: After describing *Rust* as a situation in which "government . . . used private speakers to transmit specific information pertaining to its own programs," *Rosenberger* was sharply distinguished as a case in which government "instead expends funds to encourage a diversity of views from private speakers." 515 U.S. at 833-

34. Whatever powers *Rust* gave a government grantor in the former situation -- for example, "to ensure that its message is neither garbled nor distorted by the grantee" -- has no force in the latter setting, where grantees' First Amendment rights and interests of academic freedom must be fully respected. *Id.* at 853.

Clearly, the restrictions challenged here are much like those which were invalidated in *Rosenberger*; Congress' initial premise, in 1965, was that the NEA should, as a grantor, give "the fullest attention to freedom of artistic and humanistic expression" and that "no undue preference should be given to any particular style or school of thought." *S. Rep.* No. 89-300, 89th Cong., 1st Sess. (1965); *see also 135 Cong. Rec.* S10374-01 (daily ed. Aug. 4, 1989) (statement of Sen. Pell).

Rosenberger bears even more directly on the nature of the challenged NEA restrictions. Central to that judgment was the precept that "the University may not discriminate based on the viewpoint of private persons whose speech it facilitates" through funding. *Rosenberger*, 515 U.S. at 834. Two concerns underlie that principle:

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University

> setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

Id. at 835.

What Congress did in 1990 was precisely what *Rosenberger* held that government may not do in making grants -- at least where it "expends funds to encourage a diversity of views from private speakers." *Id.* at 834. Despite the inherent vagueness and imprecision of the "decency and respect" constraints, there can be no doubt that Congress sought to "cast disapproval on particular viewpoints" by denying funding to certain artists and their works. *Id.* at 836.

The very words of the amendment's sponsor, Representative Henry, reveal precisely such a design: "We add to the criteria of artistic excellence and artistic merit," he assured his colleagues, "a shell, a screen, a *viewpoint* that must be constantly taken into account on behalf o[f] the American public." [emphasis added] *136 Cong. Rec.* H9417 (daily ed. Oct. 11, 1990) (statement of Rep. Henry). There can be no ambiguity about what the chief architect of the law had in mind. It is rare for the sponsor of restrictive language to proclaim viewpoint bias as a virtue. Yet when that is done, as it has been here, the infirmity of the resulting language should follow even more clearly.

One final difference deserves brief comment. The amendment challenged here does not by its own force restrict NEA grants, but rather directs the grant-maker to be guided

by the newly imposed criteria. Petitioner argues that the constitutional claims of grantees are muted by this less direct nexus. The difference seems at best a technical one, without substantive import.

A plausible variant brings this analysis full circle. Suppose that, in *Rosenberger*, the university's governing board (instead of directly setting the funding criteria) had told the Dean of Students to "take into consideration" the absence of sectarian or religious content in funding student publications. Suppose, further, that the case had unfolded just as it did -- that a student journal with substantial sectarian material had been deemed ineligible for funding because of its religious content. To argue that this Court would, on so technical a ground, have avoided the issue it squarely faced in *Rosenberger*, simply defies credulity. If denial of funding for a particular viewpoint, under a board directive, abridged the First Amendment, surely it would not matter that the board accomplished the same end by telling the administration it must "take into consideration" a disapproved viewpoint.

Given the close links between academic and artistic freedom, developed more fully in Section I of this brief, the conclusion to the relevant part of *Rosenberger* has special bearing upon the present case:

> The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free

> speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.

515 U.S. at 836. Few cases afford more appropriate opportunities than does this one for the reaffirmation of those abiding principles. Few occasions illustrate more graphically the role of the First Amendment as a guarantor of creative and artistic liberty as vital elements in freedom of expression.

CONCLUSION

For the foregoing reasons, amici respectfully urge affirmance of the judgment of the court of appeals.

Respectfully submitted,

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Appendix

Statement from
1990 Wolf Trap Conference on
Academic Freedom and Artistic Expression

The following is a concluding statement by the participants in the 1990 Wolf Trap Conference on Academic Freedom and Artistic Expression, sponsored by the American Association of University Professors, the American Council on Education, the Association of Governing Boards of Universities and Colleges, and the Wolf Trap Foundation. The statement was endorsed by AAUP's Committee A on Academic Freedom and Tenure and by its Council at their meetings in June, 1990.

Attempts to curtail artistic presentations at academic institutions on grounds that the works are offensive to some members of the campus community and general public occur with disturbing frequency. Those who support restrictions argue that works presented to the public rather than in the classroom or other entirely intramural settings should conform to their view of the prevailing community standard rather than to standards of academic freedom. We believe that "essential as freedom is for the relation and judgment of facts, it is even more indispensable to the imagination."[1] In our judgment academic freedom in the creation and presentation of works in the visual and performing arts, by

[1]Helen C. White, "Our Most Urgent Professional Task," *AAUP Bulletin* 45 (March 1959), 282.

ensuring greater opportunity for imaginative exploration and expression, best serves the public and the academy.

The following proposed policies are designed to assist institutions to respond to the issues that may arise from the presentation of artistic works to the public in a manner which preserves academic freedom:

1) **Academic Freedom in Artistic Expression.** Faculty and students engaged in the creation and presentation of works of the visual and performing arts are engaged in pursuing the mission of the university as much as are those who write, teach, and study in other academic disciplines. Works of the visual and performing arts are important both in their own right and because they can enhance our experience and understanding of social institutions and the human condition. Artistic expression in the classroom, studio, and workshop therefore merits the same assurance of academic freedom that is accorded to other scholarly and teaching activities. Since faculty and student artistic presentations to the public are integral to their teaching, learning, and scholarship, these presentations no less merit protection. Educational and artistic criteria should be used by all who participate in the selection and presentation of artistic works. Reasonable content-neutral regulation of the "time, place, and manner" of presentations should be developed and maintained. Academic institutions are obliged to ensure that regulations and procedures do not impair freedom of expression or discourage creativity by subjecting work to tests of propriety or ideology.

2) **Accountability**. Academic institutions provide artistic performances and exhibits to encourage artistic creativity, expression, learning, and appreciation. The institutions do not thereby endorse the specific artistic presentations nor do the presentations necessarily represent the institution. This principle of institutional neutrality does not relieve institutions of general responsibility for maintaining professional and educational standards, but it does mean that institutions are not responsible for the views or attitudes expressed in specific artists' works any more than they would be for the content of other instruction, publication, or invited speeches. Correspondingly, those who present artistic work should not represent themselves or their work as speaking for the institution and should otherwise fulfill their educational and professional responsibilities.

3) **The Audience.** When academic institutions offer exhibitions or performances to the public, they should ensure that the rights of the presenters and the audience are not impaired by a "heckler's veto" from those who may be offended by the presentation. Academic institutions should ensure that those who choose to view or attend may do so without interference. Mere presentation in a public place does not create a "captive audience." Institutions may reasonably designate specific places as generally available or unavailable for exhibitions or performances.

4) **Public Funding.** Public funding for artistic presentations and for academic institutions does not diminish (and indeed may heighten) the responsibility of the university community to ensure academic freedom and of the public to respect the integrity of academic institutions. Government imposition on artistic expression of a test of propriety, ideology, or religion is an act of censorship which impermissibly denies the academic freedom to explore, teach, and learn.

Descriptions of Amici Curiae

Founded in 1915, the American Association of University Professors is an organization of over 40,000 faculty members and research scholars in all the academic disciplines. The Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. Among the organization's central functions is the development of policy standards for the protection of academic freedom, tenure, and other elements central to higher education. The American Association of University Professors policies are widely respected and followed as models in American colleges and universities. *See e.g., Bignall v. North Idaho College*, 538 F.2d 243, 249 (9th Cir. 1976); *Mabey v. Reagan*, 537 F.2d 1036, 1043 (9th Cir. 1976); *Adamian v. Jackson*, 523 F.2d 929, 934-5 (9th Cir. 1975).

The American Association of University Professors has taken a special interest in recent years in assaults on the creative freedom of artists in higher education. In 1990 it co-sponsored the Wolf Trap Conference on Academic Freedom and Artistic Expression, bringing together forty curators, professors, university administrators, and trustees for a close examination of the nature of artistic discourse on campus. The conferees agreed that artistic expression, like other scholarly and teaching activities, functions best when freed of constraints on its content. They concluded that public funding of the arts should introduce no added tests or impairments. The district court relied on the statement

resulting from the conference, *Academic Freedom and Artistic Expression* (which appears on page 1a of the Appendix), to illustrate the nexus between artistic expression and other forms of scholarly discourse.

The American Council of Learned Societies ("ACLS") is a consortium of 60 learned societies in the humanities and social sciences.[2] Founded in 1919 and

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[2]**ACLS Constituent Societies:** African Studies Association; American Academy of Arts and Sciences; American Academy of Religion, American Anthropological Association; American Antiquarian Society; American Association for the Advancement of Slavic Studies; American Comparative Literature Association; American Dialect Society; American Economic Association; American Folklore Society; American Historical Association; American Musicological Society; American Numismatic Society; American Oriental Society; American Philological Association; American Philosophical Association; American Philosophical Society; American Political Science Association; American Psychological Association; American Society for Aesthetics; American Society for Eighteenth-Century Studies; American Society for Legal History; American Society for Theatre Research; American Society of Comparative Law; American Society of International Law; American Sociological Association; American Studies Association; Archaeological Institute of America; Association for Asian Studies; Association for Jewish Studies;

governed by a fifteen member Board of Directors and representatives of each of the societies, the ACLS supports scholarship through an extensive program of fellowships and grants, represents the American scholarly community in this country and abroad, and sponsors scholarly exchanges with many parts of the world. The ACLS and its members thus have an important interest in the outcome of this case. Both the individual societies and their members, as well as the

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Association for the Advancement of Baltic Studies; Association of American Geographers; Association of American Law Schools; Bibliographical Society of America; College Art Association; College Forum of the National Council of Teachers of English; Dictionary Society of North America; Economic History Association; German Studies Association; Hispanic Society of America; History of Science Society; Latin American Studies Association; Law and Society Association; Linguistic Society of America; Medieval Academy of America; Metaphysical Society of America; Middle East Studies Association of North America; Modern Language Association of America; National Communication Association; Organization of American Historians; Renaissance Society of America; Sixteenth Century Studies Conference; Society for Cinema Studies; Society for Ethnomusicology; Society for French Historical Studies; Society for the History of Technology; Society of Architectural Historians; Society of Biblical Literature; Society of Dance History Scholars; and Sonneck Society for American Music.

ACLS itself, receive funding from government agencies for the conduct of research. The successful completion and dissemination of that research depends upon freedom of inquiry of the most broad-ranging kind during the research process itself, and freedom of expression of an equally broad character at the resulting point of publication.

The Association of American University Presses is a cooperative, nonprofit organization which promotes the work and influence of university presses, provides cooperative services, and helps its members respond to the changing economy and environment. Formally established in 1937, its ranks now include eighty-two full members, thirteen affiliates (smaller university presses), seven international (overseas) members, and fifteen associates (scholarly presses not affiliated with universities). These presses vary greatly in size, publishing as few as one and as many as 1,200 titles in a year. They are active across many scholarly disciplines, including the social sciences, humanities, arts, and science and technology. Together they published nearly 8,000 books in 1995-96 and more than 700 scholarly journals. Roughly 16 percent of all new titles published in the United States last year were issued by university presses.

The essential purpose of university presses, as the publishing divisions of their parent institutions, is to serve scholars and scholarship in general. They exist on the cutting edge of knowledge and often function as the natural outlet for information, theory, and methodology that will influence human endeavor in the decades and generations to

come. Because so many presses are part of state universities and rely upon money from the federal government in the form of grants or subsidies from the National Endowment for the Arts, the National Endowment for the Humanities, and other agencies, the Association of American University Presses has a very strong interest in funding decisions remaining ideologically neutral and nonviewpoint-discriminatory.

The College Art Association ("CAA") is a nationwide, nonprofit organization whose members include 13,000 individual artists, art historians, and museum professionals, as well as 2,000 institutions of higher education and museums. CAA was founded in 1911 as a learned society and professional organization to promote the highest standards of scholarship and teaching in the history and criticism of the visual arts, and to foster the highest levels of technical skill in teaching and practices of art. The CAA is committed to the creation and preservation of an environment of artistic, intellectual and academic freedom. The Association values and seeks diversity among its members. It promotes and encourages, through its programs and publications, a spirit of free inquiry and innovative creative enterprise.

The CAA annual conference is the only national forum for the visual arts, providing artists, art historians, critics, museum directors and curators, educations, art administrators and other visual arts professionals from throughout the United States and from foreign countries with

an opportunity to discuss new research, criticism, and topical issues affecting the profession. The conference includes numerous slide presentations of visual art that could well be considered "indecent."

The CAA itself has benefitted directly as a recipient of grants from the National Endowment for the Arts for its annual conference and fellowship program. In addition, many of its individual and institutional members have received NEA grants. Several of CAA's members have been involved in the ongoing debate in this country over freedom of artistic expression. They include the Corcoran Gallery, which was the site of the initial uproar over the Robert Mapplethorpe show *The Perfect Moment*. The Cincinnati Contemporary Art Center refused to censor the same show. The School of the Art Institute of Chicago, a private professional college of art and design, has seen several years of controversy involving student exhibitions which shocked or offended some segments of the community. CAA is profoundly concerned with the issues raised by this appeal.

The National Humanities Alliance (NHA) is a nonprofit organization founded in 1981 to unify the public interest in the support of federal programs in the humanities. A coalition of 85 organizations, the NHA represents a broad spectrum of the humanities -- scholarly and professional associations; organizations of museums, libraries, historical societies, higher education, and state humanities councils; university-based and independent centers of scholarship; and other organizations concerned with national policies that

affect scholarship and other humanities activities.[3] All of

[3]**Active Members of the National Humanities Alliance:** American Academy of Religion; American Anthropological Association; American Association of Museums; American Council of Learned Societies; American Folklore Society; American Historical Association; American Musicological Society; American Philological Association; American Philosophical Association; American Political Science Association; American Society for Aesthetics; American Society for Eighteenth-Century Studies; American Society for Legal History; American Sociological Association; American Studies Association; Archaeological Institute of American; Association for Asian Studies; Association for Documentary Editing; Association for Jewish Studies; Association of American Colleges and Universities; Association of American Geographers; Association of American Law Schools; Association of Research Libraries; Center for Research Libraries; Chicago Historical Society; Coalition for Networked Information; College Art Association; Council of American Overseas Research Centers; Council on Library and Information Resources; Federation of State Humanities Councils; The George Washington University; History of Science Society; Independent Research Libraries Association; Linguistic Society of America; Medieval Academy of America; Middle East Studies Association; Modern Language Association; National Association of Scholars; National Council of Teachers of English; National Humanities Center; National Speech Association; Organization of American

Historians; Phi Beta Kappa Society; Renaissance Society of America; Research Libraries Group; Shakespeare Association of American Shelby Cullom Davis Center for Historical Studies, Princeton University; Sixteenth Century Studies Conference; Social Science Research Council; Society for Historical Archaeology; Society for the History of Technology; Society of Biblical Literature; Special Libraries Association; and Virginia Center for the Humanities.

Associate Members of the National Humanities Alliance: African Studies Association; American Association for State and Local History; American Comparative Literature Association; American Dialect Society; American Library Association; American Numismatic Society; American Society for Theater Research; Association of American University Presses; Association of Art Museum Directors; Center for the Humanities, City University of New York, Graduate Center; Center for the Humanities, Wesleyan University; College English Association; Community College Humanities Association; The Council of the Humanities, Princeton University; Doreen B. Townsend Center for Humanities, University of California, Berkeley; The Hastings Center; Institute for Advanced Study; Institute for the Humanities, University of Michigan; Institute for the Medial Humanities, University of Texas Medical Branch, Galveston; Institute of Early American History and Culture, College of William and Mary; International Research and Exchanges Board; Midwest Modern Language Association;

NHA's member organizations and/or their individual members receive federal funds to conduct a wide variety of humanities activities, including research, seminars, development of collections, publication, and public programs. Their interests are directly and immediately affected by vague and viewpoint-based restrictions on the receipt of federal funds.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization in Charlottesville, Virginia, whose sole mission is to safeguard freedoms of speech and press in all their many forms. The Center pursues that mission in varied ways. It has filed briefs amicus curiae in both federal and state courts in matters affecting freedom of expression. It has provided testimony requested by legislative bodies, sponsored national conferences, and taken various steps to enhance public awareness of threats to First Amendment freedoms. The arts are of particular interest to the Center, as they serve both as a form of exposition deserving of protection, and as a means for enlightening the public about the role of free expression

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Northeast Document Conservation Center; Philological Association of the Pacific Coast; Popular Culture Association; Society for Ethnomusicology; Society of Architectural Historians; Society for Cinema Studies; Society of Christian Ethics; South Central Modern Language Association; and University of California Humanities Research Institute, University of California, Irvine.

in society.

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BRIEF OF TWENTY-SIX ARTS, BROADCAST, LIBRARY, MUSEUM AND PUBLISHING AMICI CURIAE IN FAVOR OF RESPONDENTS

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BRIEF OF TWENTY-SIX ARTS, BROADCAST, LIBRARY, MUSEUM AND PUBLISHING AMICI CURIAE IN FAVOR OF RESPONDENTS

I. INTEREST OF AMICI CURIAE

As more fully described in Appendix A, *amici curiae* include a broad range of literary, arts, cultural, and other organizations from across the country.[1] They are comprised of individual institutions such as the Museum of Modern Art,

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[1] Undersigned counsel authored this brief in its entirety on behalf of *amici*. No person, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

state and local organizations such as the New York Foundation for the Arts and the Putnam Arts Council, and nationwide organizations such as the National Assembly of State Arts Agencies, Americans for the Arts, and the American Arts Alliance. They represent many thousands of authors (PEN American Center), publishers (Association of American Publishers), librarians (Freedom to Read Foundation), musicians (American Music Center and The American Symphony Orchestra League), actors (Actors' Equity Association), dancers (Dance/USA), sculptors (International Sculpture Center), hundreds of museums (Association of American Museums; Association of Art Museum Directors), theaters (Theatre Communications Group), public broadcasters (National Public Radio), magazines (Council of Literary Magazines and Presses) and other artistic and cultural institutions. Many *amici* and their members regularly participate in government programs, including those sponsored by the National Endowment for the Arts ("NEA"). Almost all interact with the government in some way, ranging from obtaining funding to receiving tax exemptions. All share a common commitment to freedom of expression that unites them as *amici* in this case.

The rights of *amici* and their members and supporters, be they author, poet, novelist, artist, museum curator, librarian, public broadcaster, or other professional, to present the public with a broad range of viewpoints serve as a cornerstone of our nation's most fundamental freedoms. *Amici* are concerned that if government officials are permitted to grant or withhold government benefits on the basis of an applicant's viewpoint, the diversity of perspective and the "free play of the spirit" which all who deal with words or images "ought especially to cultivate and practice," will be stifled. *Keyishian v. Board of Regents*, 385 U.S. 589, 601 (1967) (citation omitted). If the government can deny federal support or benefits to individual authors and artists who, according to the government, have somehow transgressed vague notions of "decency and respect," then

the rights of countless institutions including *amici* to be free from a government official's view of what expression is proper or politically correct are threatened as well. *Amici* believe that the "decency and respect" clause violates fundamental First Amendment principles and accordingly support the decisions below.

II. SUMMARY OF ARGUMENT

This case is controlled by the principles set forth in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995) governing the application of the First Amendment's Free Speech Clause to restrictions on speech in government-funded programs. Under *Rosenberger*, when the government is the speaker or enlists private entities to convey a governmental message, it is entitled to say what it wishes and may choose not to subsidize alternative or contrary viewpoints. In contrast, when the government funds a program intended to encourage private speech, it may not prefer one speaker over another on the basis of the speaker's viewpoint or the message he or she seeks to convey. In these situations, the First Amendment ban on viewpoint discrimination applies with full force. As the Department of Justice has recognized, the NEA grants at issue here are intended to encourage private speech, and therefore under *Rosenberger* the NEA cannot award or deny grants on the basis of an artist's viewpoint.

In 1990, as a result of a two-year Congressional campaign to deny NEA grants to dangerous or offensive art, Congress amended the NEA's governing statute to require the agency to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" in awarding grants. The "decency and respect" provision constitutes unlawful viewpoint discrimination. The "decency" prong requires the NEA to consider whether proposed projects conform with general standards of what society considers proper or moral; art that

expresses a viewpoint at odds with majority views of propriety or morality is ineligible for funding. The "respect" prong denies funding to projects likely to offend the "beliefs and values" of any segment of American society; to receive funding, the art may not criticize or offend anyone. Because the "decency and respect" provision violates the First Amendment, this Court should affirm the decision below.

III. ARGUMENT

A. UNDER *ROSENBERGER*, NEA GRANTS ARE FEDERALLY FUNDED "PRIVATE SPEECH" AND CANNOT CONSTITUTIONALLY BE SUBJECT TO "DECENCY AND RESPECT" VIEWPOINT DISCRIMINATION

1. The NEA And The "Decency And Respect" Restriction On Federal Arts Funding

In pursuit of a national policy of support for the arts, Congress created the NEA in 1965 to foster "the Nation's high qualities as a leader in the realm of ideas and of the spirit." 20 U.S.C. § 951(8). In creating the NEA, Congress declared

> it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent.

Id. § 951(7). The accompanying Senate committee report stated that "there [shall] be given the fullest attention to freedom of artistic and humanistic expression. . . [and] the encouragement of free inquiry and expression." S. Rep. No. 89-200, at 3-4 (1965). The Senate report made clear that

"[t]he standard should be artistic and humanistic excellence." *Id.*

Since 1965, the NEA has awarded over 110,000 grants to thousands of American artists and organizations in all 50 states.[2] Such grants are available to artistic projects meeting the standard of artistic excellence in several broadly defined categories and are intended to facilitate the diversity of private expression. *See* H.R. Rep. No. 99-274, at 13 (1985) ("[T]he [funded] programs should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free."). In 1997, the President's Committee on the Arts and the Humanities noted that the NEA constitutes the largest single source of funds for the arts available today and observed that, since its inception in 1965, the NEA has prompted a "quantum leap in cultural activity" related to the arts. The President's Committee on the Arts and the Humanities, *Creative America: A Report to the President* 25-26 (1997).

In 1990, as the culmination of a two-year Congressional campaign to deny NEA grants to offensive art, Congress amended § 954(d) of the NEA's authorizing

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[2] NEA Strategic Plan FY 1997 – FY 2002 (visited Feb. 5, 1998) <*http://arts.endow.gov/Guide/Strategic/Contents.html*> at Introduction and Background at 2 (hereinafter "NEA Strategic Plan"). The NEA's 1997 Strategic Plan cites, as examples of the diverse activities supported by federal grants, symphonies, chamber music, children's festivals, puppet theater, art education, folk festivals, museum exhibitions, dance touring, children's museums, community celebrations, at-risk youth projects, research and publications on the arts, historic and cultural preservation, radio and television programs, and artists in schools. *Id.* at 1-2.

legislation[3] to include the "decency and respect" restriction at issue here. The Act provides in relevant part:

> In establishing [grant application] regulations and procedures, the Chairperson shall ensure that --
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.*

20 U.S.C. § 954(d) (emphasis added).

Congress enacted this restriction in response to sharp and sustained criticism of the NEA by some members of Congress and private interest groups who believed that some NEA-funded art was "indecent" or "sacrilegious." *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1461-62 (C.D. Cal. 1992); *see Finley v. National Endowment for the Arts*, 100 F.3d 671, 677 (9th Cir. 1996). Congressional criticism focused initially on two such NEA-funded exhibits: first, an exhibit of Robert Mapplethorpe's photographs that included images considered homoerotic; and second, an exhibit including a photograph by Andres Serrano entitled "Piss Christ" criticized as sacrilegious or blasphemous. *Finley*, 795 F. Supp. at 1461; *see, e.g.*, 135 Cong. Rec. 9788 (1989) (statement of Sen. D'Amato expressing his constituents' "shock . . . outrage and anger" at NEA funding of Serrano's work). The Court of Appeals found that the "decency and respect" amendment was "specifically designed to prevent the funding of similar art works." *Finley*, 100 F.3d at 677.

[3] The National Foundation on the Arts and Humanities Act ("the Act").

2. NEA Grants Are Federally Funded Private Speech That, Under The Principles Of *Rosenberger*, Are Entitled To Constitutional Protection Against Congressionally Mandated Viewpoint Discrimination

The government concedes that the First Amendment bars Congress from "prohibiting controversial art merely because either the government itself or some (or even many) private persons may find it inartistic or offensive." Br. Pet'r at 19. Nevertheless, the government contends that, in the context of federal funding, it may accomplish indirectly what it is prohibited from doing directly.

The First Amendment and the decisions of this Court permit no such result. Viewpoint discrimination in government programs which encourage private speech is presumptively unconstitutional.

The fundamental principles governing the application of the First Amendment to government funding of speech or other expressive conduct, clearly articulated in this Court's *Rosenberger* and *Rust* opinions, are as follows:

Government as Speaker. The first category of government funding programs comprises those in which the government is the speaker or enlists private entities to convey a governmental message. *See Rosenberger*, 515 U.S. at 832-33. In such cases, the government may properly disseminate the message of its choice and may take reasonable steps to ensure that "its message is neither garbled nor distorted" by persons enlisted to convey the government's message. *Rosenberger*, 515 U.S. at 833.

20 U.S.C. §951 *et seq.*

Thus, in *Rust v. Sullivan*,[4] the Court held that a regulation barring private recipients of federal family planning funds from providing information or counseling on abortion did not violate the First Amendment. *Rust*, 500 U.S. at 193-94; *see also Rosenberger*, 515 U.S. at 833 ("we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message").

The statute in question in *Rust* (Title X of the Public Health Services Act) authorized the government to fund the creation and operation of family planning clinics by public or private entities, but prohibited funding for programs that included abortion as a method of family planning. 500 U.S. at 178. The Department of Health and Human Services regulations promulgated under this statute barred grant recipients from recommending or advocating abortion when giving advice in clinics receiving Title X funds. *Id.* at 179-80. According to the Court, because "the government used private speakers to transmit specific information pertaining to its own program," this viewpoint-based restriction on speech was constitutionally permissible. Rosenberger, 515 U.S. at 833; *see Rust*, 500 U.S. at 195 n.4.

Thus, under the *Rust* analysis, if the government awarded grants designed to produce artworks conveying the government message of discouraging drug use or promoting the use of condoms to avoid the spread of AIDS, the government properly could insist that the art being funded convey the selected message. Simply put, according to *Rust* and *Rosenberger*, the government need not be neutral in its own message even if it uses private persons as its spokespersons.[5] *See Rosenberger*, 515 U.S at 833. But, as

[4] 500 U.S. 173 (1991).

[5] For example, Congress clearly could "hire[ ] a sculptor to create a bust . . . of Abraham Lincoln [for the Capitol], and prohibit him from doing a bust of John Wilkes Booth." See *Finley*, 100 F.3d at 689 (Kleinfeld, J., dissenting).

the Justice Department concedes, Congress did not create the NEA to convey a government message, and the *Rust* principles are, therefore, inapposite in this case.

Programs to Encourage Private Speech. Quite different principles apply when, as here, the government funds a program intended "to encourage private speech." *Rosenberger*, 515 U.S. at 833. When the government is not the speaker (either directly or through private persons) but instead expends funds to facilitate private speech, the First Amendment precludes the government from selecting which speakers receive government funding on the basis of the message they seek to convey. *Id.* at 829-33. *Rosenberger* is thus consistent with a long line of authority from this Court. *E.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) ("the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (citation omitted); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment").[6] In short, "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Rosenberger*, 515 U.S. at 830 (citation omitted).

Significantly, in *Rosenberger*, the full Court accepted the constitutional distinction between funding "government speech" and funding "private speech." In the majority

[6] *Cf. Simon & Schuster v. Members of the New York Crime Victims Board*, 502 U.S. 105, 116 (1991) (content restrictions presumptively unconstitutional because they "raise[ ] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

opinion, Justice Kennedy set this forth definitively. *Id.* at 834 (Kennedy, J.; opinion of the Court). In his dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter noted that:

> [t]he Court draws a distinction between a State's use of public funds to advance its own speech and the State's funding of private speech . . . . I would not argue otherwise . . . .

Id. at 892 n.11.

In *Rosenberger*, the Court held unconstitutional a public university's refusal to pay certain costs of a student newspaper with religious editorial viewpoints even though it paid those costs for non-religious publications. *Id.* at 837. The purpose of the cost-reimbursement program was "to support a broad range of extracurricular activities that 'are related to the educational purpose of the University.'" *Id.* at 824 (citation omitted). Much like the NEA, the university program at issue in *Rosenberger* was established as a program to encourage private speech and not as a program to enlist private speakers to carry a government message. *See id.* at 834-35. The Court held that, having extended financial assistance to "private speakers who convey[ed] their own messages, the University may not silence the expression of selected viewpoints." *Id.*[7]

[7] The fundamental distinction articulated in *Rosenberger* finds further support in *Rust*. In *Rust*, the Court cautioned against any conclusion that "funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded program," justifies government regulation of the message conveyed. 500 U.S. at 199. Instead, the Court noted (i) that in areas "traditionally open to the public for expressive activity," the government subsidy implicit in allowing government-owned property to be used for

3. As the Justice Department Acknowledges, NEA Funding For The Arts Is A Program To Encourage "Private Speech" to Which *Rosenberger* Fully Applies

In the present case, the Court of Appeals correctly held that "[t]he NEA is a quintessential example of a Government program designed to encourage private speech" to which *Rosenberger* fully applies. *Finley*, 100 F.3d at 679 n.17; *see id.* at 682 (funding of the arts is required to be viewpoint-neutral because "Congress has clearly indicated the NEA's purpose is to support a diverse array of artistic expression"). Therefore, as demonstrated below, Congress' attempt through the "decency and respect" restriction to require the NEA to engage in viewpoint discrimination in allocating funding for the arts violates the First Amendment. And, of course, any other constitutional limitations such as vagueness would also apply.

The NEA's statutory purpose is, *inter alia*, to foster private artistic expression by creating "a climate encouraging freedom of thought, imagination and inquiry [and] also the material conditions facilitating the release of this creative talent." *See* 20 U.S.C. §951. Far from seeking to convey any *governmental* message or viewpoint, the Act is concerned with encouraging the broadest possible *private* expression involving the arts.[8] Indeed, as an "assurance

expressive purposes "does not justify [government] restriction of speech"; and (ii) that in a "traditional sphere of free expression," which would include a publicly funded university or the arts, government regulation over the content of speech is presumptively unconstitutional. *Id.* at 200.

[8] 20 U.S.C. 952(d), broadly defines "project" (an activity for which grants may be awarded) to include *e.g.*, "programs to foster American artistic creativity" and "to commission works of art."

against federal interferences in the arts," Congress expressly prohibited the NEA from interfering with the operations or policies of any arts organization. H.R. Rep. No. 89-618 (1965).

In pursuit of the NEA's goal of "foster[ing] opportunities for the creation and presentation of artistic work," the NEA supplies funds to private arts organizations to "provide resources, time and space to assist artists in creating work" and to enable such organizations to "present, exhibit, perform, and/or publish artistic work." NEA Strategic Plan at Goals at 1, Goals 2 at 1. The NEA also supplies funds to state and regional arts organizations to "support the creation of artistic work" and to "support the presentation, exhibition, performance, or publication of artistic works." *Id.*

Even the Justice Department has concluded that in "making NEA grants," the government's purpose is "to facilitate the speech of private persons, as those rationales are understood in *Rosenberger*." Letter from Andrew Fois, Assistant Attorney General, Department of Justice, to Congressman Sidney R. Yates at 2 (Oct. 5, 1995). The Justice Department expressed this conclusion in an opinion to Congress on the constitutionality of a proposed ban on NEA funding for arts projects which "denigrate the objects of belief of the adherents of a particular religion." *Id.* at 1. The opinion recognized that such a restriction would presumptively violate the First Amendment because it is aimed at a speaker's particular viewpoint. *Id.* at 2.

The Justice Department opinion letter continued:

> We do not think that the proposed restriction can be reconciled with the Court's decision in *Rosenberger*. The *Rosenberger* Court did recognize that its holding generally would not control cases in which the government subsidizes transmittal of its own preferred message, rather than expending funds to encourage the expression of private speakers. *Id.* at 2518-19 (distinguishing *Rust v. Sullivan*, 500 U.S. 173 (1991)). That distinction, however, will not save section 331, because *the government's purpose in making NEA grants appears to be less to 'convey a governmental message' than to 'facilitate the speech of private persons' as those rationales are understood in Rosenberger*.

Id. at 2 (emphasis added). A copy of this opinion is attached as Appendix B.

4. The Government's Argument That There Is No Private Speech Because NEA Funding Does Not Qualify As A Public Forum Mischaracterizes *Rosenberger* And *Rust*

Faced with *Rosenberger*'s constitutionally significant distinction between federally sponsored government speech and federally sponsored private speech, the government simply tries to ignore it and change the subject. The government claims that the *Rosenberger* case -- belying *Rosenberger*'s actual language -- created two categories: government speech and public forum speech.[9] As noted above, however, the operative categories in *Rosenberger*

[9] The starting point of the government analysis is that the two operative categories are "either conveying a governmental message or . . . creating a forum for the exchange of private views." Br. Pet'r at 30. Its brief repeatedly argues that the NEA does not "create such a forum" *But cf.* Fiscal Year 1992 Application Guidelines for NEA Theater Grants 51-52 (NEA's mission statement describing NEA as "a national forum to assist in the exchange of ideas").

were "government speech" and "private speech," not "public forum speech." Remarkably, the government fails to address the fact that, as the Justice Department itself has recognized, NEA grants constitute government-funded "private speech" which is afforded full constitutional protection under the express language and rationale of *Rosenberger*.

The government agrees that NEA grants are not subsidized governmental messages. The government rests its entire case on the assertion that NEA procedures do not create a public forum. Br. Pet'r at 30-37. In the government's view, an artistic creation merits a lower order of constitutional protection because it is not political speech or "conventional speech on matters of public concern" occurring in a "public forum." *Id.* at 30-31.

Nothing in *Rosenberger* supports the government's strained argument that the First Amendment protects private speech *only* in a public forum. Rather, *Rosenberger* broadly reaffirmed that in the realm of private speech or expression, government regulation may not discriminate on the basis of viewpoint. *Rosenberger*, 515 U.S. at 828-29.

Restrictions on governmental viewpoint discrimination in situations not involving a public forum are well-established. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (government regulations of speech on government property that is not a public forum must be viewpoint-neutral).[10] For example, in *Lamb's Chapel*, this Court applied the constitutional principle that, as applied to government

[10] The First Amendment's aversion to viewpoint discrimination is so strong that it even applies to less protected forms of speech such as "fighting words." *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 392 (1992) (ordinance punishing expression of "fighting words" which reflect some viewpoints but not others is unconstitutional on its face).

decisions affecting private speech, "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." 508 U.S. at 394. There, this Court held that the government must use a viewpoint-neutral basis on which to grant use of scarce public resources to private parties. *Id.* The opportunity to obtain NEA grants is no different.[11]

To allow the government, through the allocation of federal funding, to impose such viewpoint-based discrimination upon private artistic expression also runs afoul of this Court's holdings barring the granting of tax or other financial benefits or penalties to speakers based upon the message they convey. *E.g., Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (differential tax treatment of "First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"); *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (tax exemption of religious, trade, sports and professional journals, but not general interest magazines violates First Amendment); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591 (1983) (state tax "target[ing] a small group of newspapers" held unconstitutional); *Simon & Schuster*, 502 U.S. at 115 (statute presumed unconstitutional "if it imposes a financial burden on speakers because of the content of their speech"). None of these cases involved a public forum. All

[11] The impact of the "decency and respect" restriction upon artists conveying unpopular or controversial messages in their art, and upon the audiences for such art, is greatly aggravated by the crucial role that NEA funding plays in assisting artists to create and display their works. In its 1997 Strategic Plan, the NEA stated: "despite the recent cutbacks, the Arts Endowment remains the largest single source of national leadership and support for the arts in America." NEA Strategic Plan at Introduction and Background at 4. As a practical matter, the impact of the "decency and respect" restriction in "driving from the marketplace" controversial or unpopular art will be very great.

involved challenges to government regulation discriminating on the basis of a private speaker's viewpoint.

Moreover, there is no policy reason why the Court should adopt the Government's bald suggestion that the private speech category should be limited only to public forum cases. Such a result would be particularly draconian and contrary to prior decisions of this Court because it would place no significant constitutional limits on viewpoint discrimination in any realm of private speech, except public fora.[12] Indeed, given the pervasiveness of government activity in supporting private speech in contexts beyond public fora, such an approach would put at constitutional risk a significant portion of the private speech subsidized by the government.[13]

Finally, the government asserts that NEA grants are some hybrid between government speech and private speech that should receive diminished constitutional protection. Br. Pet'r at 29-37. Under the government's view, it would be appropriate for the Congress to "selectively fund activities based on criteria that it rationally concludes, within the confines of the First Amendment, take into account the public interest." *Id.* at 37. Under the government's public

[12] The courts have applied a stringent test in determining what constitutes a "public forum," thus limiting even further the reach of the area which the Government says is protected from viewpoint discrimination. *See* Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 Stan. L. Rev., 185, 208 (1992).

[13] The government's claim that the NEA's selection process itself turns the grant into Government speech (and thereby devoid of constitutional protection) proves too much and contradicts its own acknowledgement that NEA funding for the arts does not constitute the government conveying its own message. Such a construct would turn every case of government funding of "private speech" into "government speech," thus destroying the very boundaries set forth in *Rosenberger* and *Rust*.

interest standard, except when funding a public forum, Congress would enjoy a free hand in the private speech area selectively to fund or subsidize some private speakers to the exclusion of others based upon the messages they conveyed whenever it "rationally concludes" that such viewpoint discrimination is in the public interest. Such a "hybrid" category would provide no more constitutional protection than *Rust*. Rather, the Government's purported "third category" of speech treats non-public forum "private speech" as comparable to the government-sponsored speech in *Rust* to which no constitutional protections apply. Such a result is irreconcilable with the principles announced in *Rosenberger* and other cases proscribing viewpoint discrimination in all areas of private speech. *See* below at 20-22.

The government's position would have a devastating effect on *amici* and other institutions that work in the arts and other areas. If simply providing government funds to an institution would permit content or viewpoint based restrictions, then government, at the federal, state, county, or local level, could prohibit libraries from carrying books on disfavored topics or by objectionable authors. The perspectives included in exhibits displayed by public museums could be censored to conform with the government's version of political correctness. Political officials, not professional journalists, could dictate the messages conveyed by public broadcasting programs. Tax exemptions could be denied to disfavored religious groups, and government officials could veto the second or third class mail permits of partisan political opponents or publications that criticize its policies.[14]

[14] The fact that such censorship would be permissible, of course, does not mean that government would "rush out at once to curtail the free speech rights of those with whom they deal." *Board of Trustees of Leland Stanford Junior Univ. v. Sullivan*, 773 F.Supp. 472, 478 n.19 (D.D.C. 1991). Nevertheless, "establishment of the principle that such

Under any view of the First Amendment, the arts -- like public universities, public fora supported by government funding, or the press -- constitute "a traditional sphere of free expression" entitled to the highest level of constitutional protection. *See Rust*, 500 U.S. at 200. As the Court of Appeals concluded, "the arts, no less than the university, are 'at the core of a democratic society's cultural and political vitality'" and require government neutrality in order to thrive. *Finley*, 100 F.3d at 682. In addition, as observed, the NEA's authorizing statute itself establishes the fundamental nature of the arts as a sphere of free expression. 20 U.S.C. §953(c) prohibits [NEA] or any other federal agency from interfering with the "policy determination" or "administration or operation" of non-federal organizations). *See also Finley*, 795 F. Supp. at 1473 (the arts is a "traditional sphere of free expression . . . fundamental to the functioning of our society"). (citation omitted) These considerations all the more strongly demonstrate that the viewpoint-based discrimination imposed by the "decency and respect" restriction on "private speech" is constitutionally impermissible.[15]

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action can pass constitutional muster is sure to be implemented, and it is bound to have increasingly wide negative effects on a free society, as the legality of censorship accompanying federal [and other government] monies becomes more and more common and thus more and more deeply ingrained in the fabric of government and society." *Id.*

[15] Judge Harold Greene sharply rebuked the government's efforts in the area of academic research to defend a "gag rule" requiring university researchers to obtain government approval before publishing or publicly discussing their federally funded research results. He flatly rejected the government's arguments, echoed in this case, that *Rust* is "applicable to government grants and contracts generally, without substantial limitation." Such a broad reading of *Rust* "would be an invitation to government censorship whenever public funds flow" and "would pose an enormous threat to the First Amendment rights of American citizens." *Leland Stanford Junior University*, 773 F.Supp. at 478.

Importantly, this Court in *Rosenberger* expressly rejected many of the same arguments raised by the government here. For example, the government argues that art is not protected speech because it "may not express a single, identifiable message that the government and other 'speakers' could in any conventional sense, endorse or oppose." Br. Pet'r at 30-31. In *Rosenberger*, however, this Court recognized that public discourse is not necessarily bipolar. 515 U.S. at 831. Similarly, although the government asserts that the "decency and respect" restriction is permissible because it relates to the allocation of scarce public resources, Br. Pet'r at 35, this Court in *Rosenberger* held that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." 515 U.S. at 835. In addition, although the government argues here that the "decency and respect" restriction is constitutional because content-based distinctions are inevitable, Br. Pet'r at 19-20, this Court in *Rosenberger*, in holding that viewpoint-based restriction unconstitutional, recognized that "[h]aving offered to pay . . . the University may not silence the expression of selected viewpoints." *Id. See also Finley*, 795 F.Supp. at 1475.

B. THE "DECENCY AND RESPECT" RESTRICTION IMPOSES UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION BY WITHHOLDING FUNDING FROM ART EXPRESSING "DANGEROUS" OR "OFFENSIVE" IDEAS

1. Laws That Discriminate On The Basis Of The Speaker's Viewpoint Violate The First Amendment, And Laws Aimed At "Dangerous" Or "Offensive" Speech Are Particularly Suspect

As we demonstrate below, the "decency and respect" restriction on the award of NEA grants discriminates against artists on the basis of their viewpoints. This Court's precedents establish that such a viewpoint-based restriction on NEA funding of the arts violates the First Amendment.

It is axiomatic that

> [v]iewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger, 515 U.S. at 829. "When the government targets not subject matter but particular views taken by the speakers on a subject, the violation of the First Amendment is all the more blatant." *Id. See also R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 387 (1992); *Lamb's Chapel*, 508 U.S. at 394 (quoting *Members of the City Council of the*

City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).[16]

This Court has repeatedly stated that restrictions on speech aimed at the suppression of "dangerous" or "offensive" ideas are particularly suspect. *Rosenberger*, 515 U.S. at 834 (citations omitted); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (recognizing that the government may not "discriminate invidiously in its subsidies" in order to suppress particular viewpoints or "dangerous ideas"); *Leathers*, 499 U.S. at 452 (holding that a prohibited suppression of "dangerous ideas" can be discerned from a record of "hostile and oppressive discrimination"); *Cammarano v. United States*, 358 U.S. 498, 513 (1959); *Speiser v. Randall*, 357 U.S. 513, 519-20 (1958).

Nor can the speech be restricted merely because the speech is "offensive" to some.[17] "[T]he fact that society may

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[16] Viewpoint-based restrictions on speech not only deprive speakers of their right of free expression, but also deny the audience its right to receive the speaker's message. An inherent corollary of freedom of speech is the right to receive information and ideas. *Board of Educ. v. Pico*, 457 U.S. 853, 866-67 (1982) (recognizing that "[T]he dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.") *Id.* at 867 (quoting *Lamont v. Postmaster General*, 381 U.S.. 301, 308 (1965) (Brennan, J., concurring).

[17] *See also Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1549-50 (11th Cir. 1997) (state law banning colleges from funding student groups that advocated a lifestyle or actions prohibited by sodomy and sexual misconduct laws constitutes unlawful viewpoint discrimination); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 366-67 (8th Cir. 1988) (public university's failure to fund a gay student group constitutes unlawful viewpoint discrimination when the school subsidized other student groups; "a group has no right to funding, but

find speech offensive is not a sufficient reason for suppressing it." *Simon & Schuster*, 502 U.S. at 118 (citation omitted). Indeed, the fact that the speaker's opinion gives offense is a reason for according it constitutional protection. *Id.* "[I]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* (citation omitted.)[18]

2. Congress' Directive To The NEA To Consider If Art Is Sufficiently "Decent" Or "Respectful" To Warrant Federal Funding Constitutes Viewpoint Discrimination

The starting point in construing any statute is its language. As amended, section 954(d) obligates the NEA in awarding a grant to "take into consideration" a two-fold standard in addition to a project's artistic merit. *See* 20 U.S.C. § 954(d)(1). First, the NEA must consider whether the proposed art project comports with "general standards of decency." *Id.* Second, the NEA must consider whether the project exhibits "respect for the diverse beliefs and values of the American public." *Id.* Both elements of this standard constitute viewpoint discrimination outlawed by the First Amendment.

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when funds are made available, they must be distributed in a viewpoint-neutral manner . . .").

[18] "Regulations based on the political or controversial subject matter of speech are particularly invidious, for they restrict public debate in that area most privileged by the First Amendment." *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir. 1988); *see also Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (vague regulation violates First Amendment because it permits viewpoint discrimination against dangerous ideas).

With respect to the first element, "decent" is defined as "characterized by conformity to recognized standards of propriety or morality." The American College Dictionary (1996); *see F.C.C. v. Pacifica Foundation*, 938 U.S. 726, 740 (1978) ("the normal definition of 'indecent . . . refers to nonconformance with accepted standards of morality.") (footnote omitted). This element thus requires the NEA to consider whether art offered for funding conforms with "general standards" of what our society considers proper or moral. Under this standard, art that takes issue with generally held notions of propriety or morality, or that expresses a viewpoint at odds with majority views of what is proper or moral, will fail to satisfy this element regardless of its artistic merit or excellence.

The second element of the "decency and respect" restriction requires the NEA to judge whether an art project exhibits "respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1). Taken literally, this element would proscribe federal funding for art likely to offend the "beliefs and values" of *any* segment of American society. To avoid failing this test, art would be required to show reverence for American beliefs and values: it cannot criticize and must offend no one.[19] *See Finley*, 795 F. Supp. at 1475 (section 954(d) seeks to "suppress [art] that is offensive to some in society"). Only the blandest and most conformist art could meet such a restrictive standard.[20]

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[19] One amicus has suggested that if the Court finds the "decency and respect" criteria ambiguous, it should restrict its meaning to blasphemous art. *See Amicus* Brief of Morality in Media. But such an approach would still be an unacceptable viewpoint discrimination. One person's blasphemy may be another's religious freedom.

[20] *See, e.g., The Sacred and the Profane: A Continuing Story in Western Art*, New Art Examiner, Summer 1990 at 18 (collecting examples of art masterpieces initially condemned as irreligious or sacrilegious). For

Each element of the "decency and respect" restriction constitutes impermissible viewpoint discrimination. Whether taken singly or together, the clear-cut intent is to "favor one speaker over another" by channeling NEA funding to art projects not conveying controversial or offensive messages. *See Rosenberger*, 515 U.S. at 528. Congress' attempt to withhold financial support for art expressing "dangerous" or "offensive" ideas exemplifies unconstitutional viewpoint discrimination.

3. The Legislative History And Events Surrounding The Enactment Of The "Decency And Respect" Restriction Confirm That It Is Aimed At Art Expressing "Dangerous" Or "Offensive" Ideas

As the Eighth Circuit recently held:

> [A] public body that chooses to fund speech or expression must do so even-handedly, without discriminating among recipients on the basis of ideology . . . . This will mean, to use Holmes' phrase, that the taxpayers will occasionally be obligated to support *not only the thought of which they approve, but also the thought that they hate*. That is one of the fundamental premises of American law.

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example, commenting upon Michaelangelo's painting of the Last Judgment in the Sistine Chapel, the critic and poet Peitro Aretino wrote:

> As a Christian I feel shame and offense to my soul at the liberty you have taken . . . Indeed, such a fervent display of genital organs as would even cause a brothel to blink. Such painting belongs in a voluptuary bathhouse . . . .

Id.

Gay and Lesbian Students Ass'n., 850 F.2d at 362 (emphasis added). The legislative history of the "decency and respect" amendment demonstrates that Congress intended to eliminate NEA funding for art embodying just this sort of "thought that they hate."

The "decency and respect" restriction represents the culmination of two years of intense Congressional criticism of the NEA in response to the use of federal funds to support exhibitions of works by Mapplethorpe, Serrano, and other artists producing "offensive" art.[21] *See* above at 6-7. Members of Congress denounced these works as highly offensive and blasphemous. For example, Senator D'Amato, together with twenty-five other senators, condemned the Serrano photograph as "shocking, abhorrent and completely undeserving of any recognition whatsoever." 135 Cong. Rec. 9788 (1989). Representative Baker described these works as "offensive to the vast majority of Americans" and "denigrating the values which are the foundation of our democracy." 135 Cong. Rec. 8809 (1989). Senator Helms expressed "outrage" at the NEA for supporting Serrano's work and claimed that the artist "went out of his way to

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[21] Notably, a jury acquitted the Cincinnati Museum of Contemporary Art and its art director on obscenity charges brought against them for displaying the Mapplethorpe exhibit. Lew Moores, *Barrie: Constitution the Real Winner Verdict Signals a Change*, The Cincinnati Enquirer, Oct. 6, 1990, at A07. In addition, several members of Congress recognized that the Serrano photograph was not within the purview of obscenity laws. *E.g.*, Reauthorization of the National Endowment for the Arts and Humanities: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, Serial No. 101-78, Vol. 3 at 72 (1990) (Statement of Rep. Dana Rohrabacher) (hereinafter "Reauthorization Hearings"). Minority Views of Senator Coats, Arts, Humanities and Museum Amendments of 1990, S. Rep. No. 101-472 (Sept. 25, 1990).

insult the Christian community."[22] 136 Cong. Rec. 33485 (1990). *See generally* Raleigh Douglas Herbert, *National Endowment for the Arts -- The Federal Government's Funding of the Arts and The Decency Clause*, 18 Seton Hall Legis. J. 413, 416 (1993).

Congressional leaders proposed various amendments to the legislation governing the NEA to prevent future funding for offensive art. In 1989, as part of the fiscal year 1990 Department of Interior and Related Agencies Appropriation Act, Congress enacted a broad content restriction barring art that depicted sadomasochism, homoeroticism, and sexual exploitation of children. This provision, held unconstitutional in *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F.Supp. 774 (C.D. Cal. 1991), illustrates Congress' resolve to prevent the NEA from funding controversial or "offensive" art. *See, e.g.*, 135 Cong. Rec. 14375 (1989) ("We intend to remain vigilant and ensure that such scurrilous attacks on religious beliefs with Government support do not happen again") (Statement of Rep. Kasich); 135 Cong. Rec. 22376 (1989) ("I think we would agree that the two examples, the Serrano piece, that is the crucifix in urine, was unacceptable, insulting to the basic principles of everybody in the country") (Statement of Sen. Johnston).[23]

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[22] Serrano has defended his piece as a work that was sensitive to – not blasphemous toward – religion. He said that he was concerned with the debasement of religion in modern American society and chose this dramatic – and to some troubling – presentation to make this point effectively. Alan Parachini, *Panel Seeks Funding Ban on 2 Arts Groups*, L.A. Times, July 26, 1989.

[23] This Court should reject the government's suggestion that the "decency and respect" restriction is a constitutionally permissible compromise between members of Congress who advocated restrictions and those who did not. As the Court of Appeals observed, Congressional attention centered not on whether Congress should enact viewpoint based

As enacted, the "decency and respect" restriction was clearly aimed at prohibiting the funding of art offensive or "disrespectful" to the cultural and religious beliefs of politically significant segments of the American public. Representative Coleman said the new provision made clear that, under the restriction, "[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." 136 Cong. Rec. 28624 (1990). *See also, e.g.*, Reauthorization Hearings, Serial No. 101-77, Vol. 2, at 51 (Statement of Rep. Perkins) (federal funding of art should not be "inconsistent with those beliefs" that "purvey the view of this country"); *Id.* at 48-49 (Statement of Rep. Henry) (speaking of the "cruelty when artists deliberately confront society and question its moral and cultural assumptions"). Having been enacted as an attack against "dangerous ideas" and "offensive depictions," the "decency and respect" restriction cannot be said to be anything but a viewpoint-based restriction, and therefore is constitutionally impermissible.

The Justice Department itself concluded that if a decency restriction on NEA's funding was "intended or construed to reach certain depictions because the opinion or views reflected gave offense, then the restriction would raise very serious First Amendment concerns . . . ." *See* Appendix B at 4. In sum, in the words of the Justice Department, there can be no doubt that, in the "decency and respect" restrictions at issue here, the Congress aimed at "depictions" which "gave offense."

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restrictions, but on what form those restrictions would take. *Finley*, 100 F.3d at 677.

4. The "Decency And Respect" Restriction Cannot Be Defended As Directing The NEA To Consider Benign Factors Related To Public Support For The Art

In its brief, the government repeatedly suggests that the "decency and respect" restriction simply calls upon the NEA to consider legitimate factors pertaining to whether art "warrant[s] public financial support," such as the project's relevance, educational value, and suitability for special audiences. Br. Pet'r at 19, 32. But that is not what the restrictions were designed to do. Rather, the viewpoint-based "decency and respect" restrictions were aimed squarely at eliminating funding for art expressing offensive or dangerous ideas.

No case has been, or can be, made that art that is not sufficiently "decent" or "respectful" to pass muster under the Congressionally imposed restriction lacks sufficient artistic merit to warrant public support. If this were so, the challenged statutory amendment would be rendered redundant and superfluous, since "indecent" or "disrespectful" art would be excluded by the general "artistic merit" standard in place prior to this amendment. *See Finley*, 795 F. Supp. at 1471 ("Had Congress believed that 'decency' and 'respect for diverse views' was naturally embedded in the concept of 'artistic merit,' there would be no need to elaborate on that standard.").

In addition, it can hardly be said that art excluded from NEA funding by the "decency and respect" restriction would fail to "meet the needs of" or "appeal to" substantial and important audiences for art in the United States. As illustrated by the crowds attending the Mapplethorpe photography exhibit after its condemnation in Congress, art deemed "indecent" or "disrespectful"(and so potentially

excluded from NEA funding under the decency standard) may nonetheless be of interest to, and highly regarded by, sizable segments of the art audience. Elizabeth Kastor, *WPA Show Attracts Thousands*, Wash. Post, July 26, 1989, at C1.

5. The Requirement That "Decency And Respect" Be "Taken Into Consideration" In Awarding NEA Funding Exacerbates The Constitutional Violation

The government makes much of the fact that section 954(d) directs the NEA only to "take into consideration" whether a grant proposal complies with the "decency and respect" standard, which the government characterizes as a "nondispositive component" of the grant approval process. Br. Pet'r at 23-25, 43-45. That position is untenable; in other contexts, this Court has held unlawful government consideration of similar "nondispositive" but unconstitutional factors that had a determinative influence on the government's decision. *See e.g. Hazen Paper Co. v. Biggens*, 507 U.S. 604, 610 (1993).

Moreover, even if the government's construction of Section 954(d) were correct, the NEA would nonetheless be free, in any particular case, to decide whether, and to what extent, the "decency and respect" restriction should be applied. This Court has been vigilant to strike down enactments that vest "overly broad discretion" in a government official and thereby allow such viewpoint discrimination. *E.g.*, *Forsyth County Georgia v. Nationalist Movement*, 505 U.S. 123, 129-133 (1992). Given the potential of such open-ended discretion to "chill" artistic expression, the NEA's unfettered discretion in applying this standard would only exacerbate the constitutional violation.

IV. CONCLUSION

For the reasons discussed above, the Court of Appeals' decision holding the "decency and respect" provision unconstitutional should be affirmed.

Respectfully submitted,

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February 6, 1998

APPENDIX A -- STATEMENTS OF INTEREST OF INDIVIDUAL AMICI

Actors' Equity Association

Actors' Equity is the union of professional Actors and Stage Managers in the United States, representing close to 40,000 individuals. One of the basic tenets of this organization is to support freedom of expression and the right of artists (whether it be actor, director or playwright) to create unfettered by censorship. This has been Equity's position since it was founded in 1913.

American Arts Alliance

The American Arts Alliance was founded in 1977 and is the principal advocate for America's professional non-profit arts organizations and their publics in representing arts interests and advancing arts support before Congress and other branches of federal government. The Alliance comprises the following five national service organizations representing different arts disciplines -- Association of Art Museum Directors, Association of Performing Arts Presenters, Dance/USA, OPERA America, and Theatre Communications Group, representing a total of approximately 2500 member organizations from all across the nation. The Alliance advocates the development of national policies which recognize, enhance and foster the contributions that the arts make to America. We believe that not only does an individual's right of freedom of expression ensure such contributions, but also that the imposition by government of content and viewpoint restrictions on artists and arts institutions which receive government funds violates the First Amendment.

American Association of Museums

The American Association of Museums represents the entire museum community, including art, history, science, military and children's museums, as well as arboreta, aquariums, and zoos, and general and specialty museums. AAM comprises more than 15,300 active members, including more than 11,100 museum professionals, volunteers, and trustees; 1,300 corporate members; and 2,900 institutional members. Many of our members receive federal grants. We do not think it is in the best interest of the museum community or the United States for the federal government to be allowed to apply political and ideological tests to grants. The threatened actions in this case could severely curtail academic, scientific and artistic freedom in our member organizations.

Americans for the Arts

Americans for the Arts is the national organization for groups and individuals across the United States dedicated to advancing the arts and culture. Founded by both the American Council for the Arts, representing a broad network of arts supporters, patrons and business leaders, and the National Assembly of Local Arts Agencies, the country's largest alliance of community arts organizations, we strive to make the arts more accessible to every adult and child in America. To this end, we work with cultural organizations, arts and business leaders, elected officials, and patrons to provide leadership, advocacy, visibility, professional development, and research and information that will advance support for the arts and culture in our nation's communities and ensure that all Americans have access to and can participate in the arts. In addition, Americans for the Arts is a leading advocacy organization for public funding of the arts at the federal, state and local government levels and our

members include state and local art councils that subgrant federal, state and local government funds. To these ends, Americans for the Arts is concerned about the chilling effect of imposing content and viewpoint restrictions on publicly funded arts projects and the resulting effect on the creativity and free expression of artists and arts organizations. It is our belief that our nation needs to provide artists with a fertile environment for creativity through both public funding opportunities and enlightened cultural policies in order to advance the democratic values from which our republic was borne.

American Music Center

The American Music Center is a national service organization which promotes the creation, performance, and appreciation of American contemporary music. Founded in 1939 by composers such as Aaron Copland, Howard Hanson, and Otto Luening, the Center serves as an information resource concerning American music and as an advocate for the American composer. As an advocate for living American artists, we are concerned about the effect of content and viewpoint restrictions on the creative artist. It is important to insure that the composer is able to compose operas, choral works, songs, theater works, symphonies, and chamber music without the fear of censorship.

American Symphony Orchestra League

The American Symphony Orchestra League, founded in 1942 and chartered by an act of Congress in 1962, is the national organization serving America's 1,800 symphony and chamber orchestras. The League provides management resources, professional development programs, education programs, consultation, volunteer development, public

relations and marketing for its member orchestras. The League also publishes books and periodicals, including the bimonthly SYMPHONY, the only national magazine about American orchestras. The League is the voice of America's orchestras and represents their interests before Congress, federal agencies, and the public. The role of the public sector, and in particular that of the National Endowment for the Arts, has been pivotal in the growth and development of American music. To condition this support by placing viewpoint restrictions on artistic expression presents a threat to the creative force of orchestral music, just as it threatens creative expression in the rest of the arts and humanities.

Arts & Business Council

As a non-profit organization that seeks to encourage the arts and business sectors to develop mutually beneficial relationships that ultimately serve the interest of the community at large, the Council is deeply concerned about the *Finley* case. Founded in 1965, the Council has 28 affiliates in cities across the nation representing hundreds of arts and business institutions. In New York City alone, the Council's membership includes approximately 150 arts and cultural institutions, including the Lincoln Center, and about 100 businesses. The possibility that receipt of government funds may bring with it limitations on the freedom of expression is a result that is potentially harmful to everyone. Such content and viewpoint restrictions are in no one's best interest and, in our view, violate the First Amendment.

Association of American Publishers

The Association of American Publishers is the national trade association of the U.S. book publishing industry. AAP members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and

scholarly societies. Defending freedom of expression is one of the Association's top priorities. AAP supports artistic freedom for the National Endowment for the Arts, which plays such an important role in American letters. In addition, a number of AAP members are affiliated with institutions such as colleges and universities, which receive public funding, and the Association is concerned over the issue of tying such funding to government-imposed content and viewpoint restrictions.

Association of Art Museum Directors

The purpose of the Association of Art Museum Directors (AAMD) is to aid its members in establishing and maintaining high standards for themselves and the museums they represent. It serves as a forum for the exchange of information and the exploration of ideas, and as a voice with which museum directors express their joint concerns and those of their institutions. The AAMD, which was founded in 1916, represents one hundred sixty directors of the most important art museums throughout the United States, Canada, and Mexico. The AAMD is vitally concerned that freedom of expression be maintained. The various fields of artistic expression are exemplified throughout the history of civilization by societies which have and will continue to be measured by their cultural accomplishments. The culture of this nation continues to be substantially strengthened by the National Endowment for the Arts and its efforts on behalf of excellence and access, which should not be hampered by improper government viewpoint restrictions.

Association of Performing Arts Presenters

The Association of Performing Arts Presenters is a national association of performing arts presenters, touring artists and artists' managers. Founded in 1956, Arts

Presenters has a membership of approximately 1200 organizations dedicated to bringing audiences and artists together. Thirty percent of our presenting organization members are on university campuses with long histories of dealing with freedom of expression and academic freedom issues. Among our members are a number of individuals and organizations who would be directly harmed by a Congressional mandated decency standard. Arts Presenters seeks the inclusion of varied experiences in the belief that such pluralism leads to continued exploration and discovery which benefits both our membership and society. We welcome a broad cross-section of organizations and artists from throughout the world. This inclusive dynamic implies tolerance and respect for those with differing priorities and underscores the primacy of original thought. Our commitment to freedom of expression flows directly from these deeply held convictions.

Council of Literary Magazines and Presses

The mission of the Council of Literary Magazines and Presses is to preserve, promote and support literary magazines and presses. To this end, CLMP represents approximately 300 primarily not-for-profit, independent literary magazines and presses. These magazines and presses offer a door to freedom of expression in America. Experimental literature, work by emerging writers and writing by minority groups has been presented primarily by the independent literary magazines and presses in our country because economic concerns and cultural indifference have often precluded publishing in the commercial market. Publishers of periodicals and books that are primarily literary exist in all regions, all populations and all nationalities of our country. CLMP is a primary service organization and advocate in this dynamic field.

Dance/USA

Dance/USA, the national service organization for not-for-profit dance, seeks to advance the artform of dance by addressing the needs, concerns and interests of professional dance. Dance/USA was founded in 1982 following the release of a report by the Task Force for a National Dance Organization which called for the establishment of a national service organization for professional dance. Dance/USA's membership include over 250 ballet, modern, ethnic, jazz and tap companies, dance service and presenting organizations, individuals, and other organizations nationwide. With support from the American Arts Alliance, Dance/USA maintains active communications with its membership and provides research relating to grassroots advocacy efforts on arts-related issues and the legislative process. Dance/USA supports, among other things, federal funding for the arts, including the National Endowment for the Arts, and free expression for dancers and other artists.

Feminists for Free Expression

Feminist for Free Expression (FFE) is a non-profit organization composed of a diverse group of feminist women and men, including artist, writers, and scholars. FFE believes that laws discriminating against "indecent" or "disrespectful" ideas have traditionally been used to silence women and deter the growth of women's rights. We believe that genuine feminism encourages individual intellectual and artistic growth, including access to a broad range of ideas about sexuality, politics, and religion without the intervention of the state.

Freedom to Read Foundation

The Freedom to Read Foundation ("Foundation") is a non-profit organization established in 1969 by the American Library Association ("ALA"). The ALA is the oldest and largest library association in the world and the primary voice of the modern library movement in North America. The ALA established the Foundation to promote and defend First Amendment rights; foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and set legal precedent for the freedom to read of all citizens.

Hallwalls, Inc.

Hallwalls, Inc. is a multidisciplinary contemporary arts center located in Buffalo, NY. It presents programming in visual arts, film, video, performance, and music. Hallwalls' mission statement is to recognize and serve a vital community artistic presence which is global in its outlook, challenging in its ideas, pluralistic in its concerns, and diverse in its expression. In keeping with this mission Hallwalls is dedicated to work that challenges traditional artistic boundaries and critically engages with current issues in the arts and society. It is a vital part of this mission to protect the right of freedom of expression for artists, and free access to their works by interested individuals. Hallwalls was recently denied grant funding by the NEA National Council because of fears about the political reaction to the work of some Hallwalls sponsored artists, despite the fact that Hallwalls' grant proposal was judged of the highest artistic merit by the NEA peer review panels. NEA staff has encouraged Hallwalls to engage in self-censorship to improve its chances of future NEA funding. Thus, the

outcome of this case is of crucial importance to the ability of Hallwalls to fulfill its mission.

International Sculpture Center

The International Sculpture Center (ISC) is a U.S.-based, non-profit arts organization dedicated to both sculptors and contemporary sculpture. In this dual capacity, the ISC is a service and an educational organization, with more than 10,000 members in the U.S. Within the scope of the ISC, sculpture is most broadly defined as all developments in three dimensional art from the most traditional to the most experimental. The ISC focuses on the presentation of sculpture to local and national audiences; the collection and dissemination of significant technical, aesthetic, statistical and other newsworthy information on sculpture and sculptors; and above all, the development of a stable environment and support system which allows sculptors the security to create new work and advance their careers as professionals. In addition, the ISC's programs include other visual art mediums when such activities are deemed critical to the creation of a supportive environment for sculpture and sculptors. It is because of this mission that the ISC feels that the lower courts' decisions in *Finley v. NEA* should be affirmed. The "decency and respect standard" interferes with freedom of artistic expression under the First Amendment. To impose content and viewpoint restrictions of this type on artists applying for federal funding is therefore unconstitutional.

The Literary Network

The Literary Network, a project of the Council of Literary Magazines and Presses, Poets & Writers and other non-profit literary organizations, is organizing the field of literature, including writers, booksellers, librarians, English teachers, small presses and literary magazines, to respond to

attacks on freedom of expression. The Literary Network has a special focus on the National Endowment for the Arts.

The Museum of Modern Art

The Museum of Modern Art was founded in 1929 in New York to foster appreciation and understanding of the modern visual arts which were then rarely recognized by traditional art museums. As the preeminent institution devoted to the arts of the 20th century, The Museum of Modern Art has played a critical role in the evolution and recognition of modern art and design both in the United States and internationally. The Museum's collection now includes more than 100,000 paintings, sculptures, drawings, prints, photographs, architectural models and plans, and design objects, approximately 12,000 films and more than 4 million film stills. Attendance generally ranges between 1.2 million and 1.5 million visitors each year. The Museum of Modern Art opposes any legislative or any governmental interference with artistic freedom of expression, which it believes essential to creativity, and is proud to join in this *amicus* brief.

National Assembly of State Arts Agencies

The National Assembly of State Arts Agencies (NASAA) is a non-profit, tax exempt membership organization representing the state arts agencies of the United States and six U.S. jurisdictions including American Samoa, the District of Columbia, Guam, the Northern Marianas, Puerto Rico, and the U.S. Virgin Islands. NASAA serves as the collective voice and service organization for these agencies. NASAA believes the arts are central to the educational, economic and cultural well being of our society. Such a society values the unique capacities of individuals, the diversity of the cultural groups to which they belong and

the communities in which they live. NASAA, in support of the First Amendment's guarantee of freedom of expression, urges the Supreme Court to affirm the decisions below to protect this fundamental constitutional right.

National Public Radio

National Public Radio ("NPR") is a non-profit membership corporation which produces, acquires, and distributes news, informational, and cultural radio programming, such as *All Things Considered, Morning Edition, Talk of the Nation, and Performance Today*, to millions of listeners every day throughout the United States. NPR represents the interest of more than 590 member and affiliated public radio stations on matters of public policy affecting public broadcasting. NPR and many of its member stations have received direct support from the National Endowment for the Arts for the production of public radio programming. Continued access to such support, consistent with the First Amendment and journalistic prerogatives of NPR and public radio stations, is critical to the continued development and distribution of innovative programming of the highest quality.

New York City Arts Coalition

The New York City Arts Coalition represents over 100 non-profit arts organizations - from major museums to alternative spaces; from organizations to advocacy groups; and from borough arts councils to grant-givers. Since our establishment in 1986, we have provided economic data, policy analysis and advocacy support during every major budgetary and political crisis in the arts as well as providing support for ongoing non-crisis advocacy efforts. We regularly monitor proposed changes impacting the arts on the federal, state and local level. Our support for the arts and a

broad range of arts organizations includes promoting and defending the fundamental American principle of freedom of expression which is at stake in this important case.

New York Folklore Society, Inc.

The New York Folklore Society is a non-profit organization dedicated to furthering cultural equity and cross-cultural understanding through its progress serving the field of folklife in New York State. Folklife and folk culture expressions are rooted in community traditions and are intimately linked to a community's sense of identity. The standards applied to concepts such as decency vary widely across -- as well as within -- cultures and communities. A community or culture continually defines itself in changing circumstances partially through its free dialogue and debate about such categories. The guarantees of freedom of expression contained within the Constitution are absolutely essential enablers of this democratic process. It is this *process*, which occurs through the arts as well as through economic and political discourse, that the government should support; the government should not attempt to support or enforce a particular *outcome* of free exchange of ideas that identify the hallmark of democracy. On this basis, the New York Folklore Society is pleased to join this *amicus curiae* brief.

New York Foundation for the Arts

The New York Foundation for the Arts (NFYA), founded in 1971, provides direct financial support to individual artists and supports artists and art as central to cultural growth and diversity. One of the largest providers of artists services and programs of all artistic practices in the country, NYFA seeks to connect artists with audiences and educate audiences about the artist behind the art they see.

NYFA participates in education projects which help people understand the artists' condition in society and freedom of expression issues, based on a belief that creativity is the right of every citizen. The Foundation opposes any restrictions on artists' freedom of expression and supports government funding of the arts and artists.

PEN American Center

Pen American Center ("PEN") is an organization of over 2,500 novelists, poets, essayists, translators, playwrights, and editors. As part of international PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has take a leading role in attacking restrictive rules that limit freedom of expression in this country. PEN and its members have received NEA grants since 1965, and would suffer severe hardships in their efforts to create if the vague and uncertain "indecency" provisions were applied. Indeed, PEN administers or sponsors over ten literary awards in which leading authors pass judgment upon the literary merit of other writers. They would be at a total loss if they were required to apply such vague and viewpoint notions as "general standards of decency and respect" before awarding grants to applicants. These terms have no established meaning in the literary field, and applying them would require the governing boards to make political judgments totally foreign to their expertise. PEN accordingly joins this brief.

Putnam Arts Council

The Putnam Arts Council is a not for profit 501(c)3 cultural service organization chartered in 1963 by the state of New York for educational and museum purposes. Its mission is to promote, foster, perpetuate and encourage the arts in all forms in Putnam County and its environs. 1996 marked the 25th

anniversary of its operation at the Belle Levine Art Center facility in Mahopac. It is our firm belief that this local arts agency plays a key role not only in the development of the arts community -- its artists and its organizations -- but also in community building as a whole. The Putnam Arts Council impacts the development and growth of the community by fostering the integration of aesthetics and everyday life, articulating the community's identity and promoting economic stability and planned growth. We are pleased to join this *amicus curiae* brief in support of free expression in the arts.

Theatre Communications Group

Theatre Communications Group (TCG) is the national organization for non-profit professional theatres. TCG serves 324 theatres located in 44 states and the District of Columbia, and provides numerous services and programs to assist the work of thousands of actors, directors, playwrights, literary managers, and other theatre personnel. TCG offers fellowships, commissions and grants to promising playwrights, directors and designers; it commissions the publication of new works; and it does extensive research and reporting on the state of professional theatre. The non-profit theatres represented by TCG range from small ensemble companies to multi-million dollar institutions and perform and produce an immense variety of plays. Such theatres also contribute significantly to the development of new plays and playwrights. Every Pulitzer Prize-winning play since 1976 received its premiere professional production at a non-profit theatre. The theatres represented by TCG reflect the pluralistic nature of American theatre, and include companies devoted to creative enhancement and appreciation of a wide diversity of cultures. However, the richness of American theatre, and the freedom of artistic expression giving root to that diversity, have been endangered by the NEA's attempts to deviate from one of its primary stated tasks: to lend support to "projects and productions which have substantial artistic and

cultural significance, giving emphasis to American creativity and cultural diversity." TCG accordingly joins this brief.

APPENDIX B – DEPARTMENT OF JUSTICE OPINION LETTER

[attached]

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 5, 1995

The Honorable Sidney R. Yates
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Yates:

This letter presents the views of the Office of Legal Counsel on H.R. 1977, a bill making appropriations for the Department of Interior and related agencies for the fiscal year ending September 30, 1996. Our comments are limited to sections 331 and 332 of the bill, which place restrictions on the use of funds by the National Endowment for the Arts (NEA).

1. Section 331

Section 331 of the bill would prohibit the use of funds appropriated for the NEA "to promote, disseminate, sponsor or produce materials or performances which denigrate the objects or beliefs of the adherents of a particular religion." Because this provision "targets . . . particular views taken by speakers on a subject," see Rosenberger v. Rector and Visitors of Univ. of Virginia, 115 S. Ct. 2510, 2516 (1995), it presumptively violates the First Amendment Free Speech Clause.

In Rosenberger, the Supreme Court held that the University of Virginia violated the Free Speech Clause by denying otherwise available funds to student publications that "promote[d] or manifest[ed] a particular belief in or about" religion. Id. at 2513. Analogizing the University's funding program to a limited public forum, the Court concluded that the restriction on religious content constituted impermissible viewpoint discrimination, despite the fact that it extended equally to "any view on the merits of religion," id. at 2549 (Souter, J., dissenting), whether favorable or unfavorable. Id. at 2517-18. The restriction contemplated here, of course, is even more problematic than that at issue in Rosenberger. By selecting one particular viewpoint on religion for disfavored treatment -- that is, by denying funding not

for all art that reflects a view about religion, but only for art that "denigrate[s]" religion -- section 331 more self-evidently would operate to skew the "marketplace of ideas." Cf. id. at 2518.

We do not think that the proposed restriction can be reconciled with the Court's decision in Rosenberger. The Rosenberger Court did recognize that its holding generally would not control cases in which the government subsidizes transmittal of its own preferred message, rather than expending funds to encourage the expression of private speakers. Id. at 2518-19 (distinguishing Rust v. Sullivan, 500 U.S. 173 (1991)). That distinction, however, will not save section 331, because the government's purpose in making NEA grants appears to be less to "convey a governmental message" than to "facilitate[] the speech of private persons, as those rationales are understood in Rosenberger. Id. at 2519.[1] Nor can Rosenberger be distinguished for present purposes on the ground that it involved a program analogous to a limited public forum. Whether or not the government has opened a limited public forum, it may not single out and disfavor viewpoints to which it is opposed when it otherwise awards access to government property or grants for private speech. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (access to government charity drive, deemed nonpublic forum); Regan v. Taxation with Representation of Washington, 461 U.S. 540, (1983) (eligibility for lobbying subsidies). Because it contravenes this threshold requirement of viewpoint neutrality, applied most recently in Rosenberger, section 331 is "presumed impermissible" under the Free Speech Clause. Rosenberger, 115 S. Ct. at 2517.[2]

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[1] Were it otherwise -- that is, were NEA grants intended to "convey a governmental message" — then special Establishment Clause concerns might be raised whenever the NEA provided a grant in support of art with religious content. Funding of the student religious publication in Rosenberger was permissible under the Establishment Clause only because the University's program "respect[ed] the critical difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clause protect." 115 S. Ct. at 2523 (internal quotation omitted). If the NEA funding program, by contrast, could be characterized as one "subsidiz[ing] transmittal of a message [the government] favors," id. at 2519, then inclusion of religious art in the program might be in tension with the Establishment Clause prohibition on governmental endorsement of religion. Id. at 2523.

[2] Because section 331 is so evidently infirm under the Free Speech Clause, we do not address here the distinct Establishment Clause concerns that are raised by the provision's apparent departure from the general rule that the government "pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over

2. Section 332

Section 332 of the bill would prohibit use of NEA funds to "promote, disseminate, sponsor, or produce materials or performances that depict or describe, in a patently offensive way, sexual or excretory activities or organs." Under the viewpoint neutrality principles described above, this provision, too, may implicate Free Speech Clause concerns.

That is not to say that the government may not impose certain content-based eligibility criteria on access to government property and funds for private expression. In a funding program like that at issue in Rosenberger, for instance, analogous to a limited public forum, the government may make content-based distinctions in order to confine the forum to the specific purposes for which it was created. See id. at 2516-17. In a nonpublic forum, the government may engage in content-based regulation of access so long as its regulations are both viewpoint neutral and "reasonable in light of the purpose served by the forum." See Cornelius, 473 U.S. at 806. See also Regan, 461 U.S. at 547-50 (approving selective subsidization of speakers without forum analysis). In short, however the program is characterized, the First Amendment permits at least some content-based distinctions in the context of an arts-funding program like that administered by the NEA.[3]

Whether the restriction contemplated by section 332 would fall within this category of permissible content-based criteria depends on how it is construed and applied. We note that the Supreme Court has reviewed and approved, in a different context, a restriction on "indecent" expression framed in terms nearly identical to those of section 332. See FCC v. Pacifica Foundation, 438 U.S. 726 (1978).[4] From Pacifica, it follows that a regulation based on "decency" considerations need not constitute impermissible viewpoint-based discrimination, but can instead be interpreted so that it does not

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nonadherents." See Board of Educ. of Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2487 (1994).

[3] See also Advocates for the Arts v. Thompson, 532 F.2d 792, 795 (1st Cir. 1976) (upholding denial of grant to literary magazine based on content of poem) ("The decision to withhold support is unavoidably based in some part on the 'subject matter' or 'content' of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants.").

[4] At issue in Pacifica was FCC regulation of certain "indecent" speech, defined by the FCC to include depictions of "sexual and excretory activities in a patently offensive manner." 438 U.S. at 731-32.

operate to suppress disfavored views or opinions. Id. at 745 (Stevens, J.). If, however, section 332 were intended or construed to reach certain depictions because the opinions or views reflected gave offense, then the restriction would raise very serious First Amendment concerns under the principles outlined above.

Assuming that the provision at issue is construed and applied in a viewpoint neutral manner, a question might still remain as to whether the restriction is "reasonable" in this context. Pacifica, which relies on the special justifications for restricting broadcast speech accessible to children, see 438 U.S. at 748-50, offers little support in this respect. But section 332 can readily be justified by reference to its own unique context. For instance, Congress reasonably could decide that decency considerations should be one component[5] of the content-based aesthetic judgments necessarily implicated by an arts-funding program. See Advocates for the Arts, 532 F.2d at 796 ("If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable.").

Sincerely,

Andrew Fois
Assistant Attorney General

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5 See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.")

EDITOR'S NOTE

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Office of Legislative Affairs

Office of the Assistant Attorney General — Washington, D.C. 20530

October 5, 1995

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[2] Because section 331 is so evidently infirm under the Free Speech Clause, we do not address here the distinct Establishment Clause concerns that are raised by the provision's apparent departure from the general rule that the government "pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over

2. Section 332

Section 332 of the bill would prohibit use of NEA funds to "promote, disseminate, sponsor, or produce materials or performances that depict or describe, in a patently offensive way, sexual or excretory activities or organs." Under the viewpoint neutrality principles described above, this provision, too, may implicate Free Speech Clause concerns.

That is not to say that the government may not impose certain content-based eligibility criteria on access to government property and funds for private expression. In a funding program like that at issue in Rosenberger, for instance, analogous to a limited public forum, the government may make content-based distinctions in order to confine the forum to the specific purposes for which it was created. See id. at 2516-17. In a nonpublic forum, the government may engage in content-based regulation of access so long as its regulations are both viewpoint neutral and "reasonable in light of the purpose served by the forum." See Cornelius, 473 U.S. at 806. See also Regan, 461 U.S. at 547-50 (approving selective subsidization of speakers without forum analysis). In short, however the program is characterized, the First Amendment permits at least some content-based distinctions in the context of an arts-funding program like that administered by the NEA.[3]

Whether the restriction contemplated by section 332 would fall within this category of permissible content-based criteria depends on how it is construed and applied. We note that the Supreme Court has reviewed and approved, in a different context, a restriction on "indecent" expression framed in terms nearly identical to those of section 332. See FCC v. Pacifica Foundation, 438 U.S. 726 (1978).[4] From Pacifica, it follows that a regulation based on "decency" considerations need not constitute impermissible viewpoint-based discrimination, but can instead be interpreted so that it does not

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nonadherents." See Board of Educ. of Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2487 (1994).

[3] See also Advocates for the Arts v. Thomson, 532 F.2d 792, 795 (1st Cir. 1976) (upholding denial of grant to literary magazine based on content of poem) ("The decision to withhold support is unavoidably based in some part on the 'subject matter' or 'content' of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants.").

[4] At issue in Pacifica was FCC regulation of certain "indecent" speech, defined by the FCC to include depictions of "sexual and excretory activities in a patently offensive manner." 438 U.S. at 731-32.

operate to suppress disfavored views or opinions. Id. at 745 (Stevens, J.). If, however, section 332 were intended or construed to reach certain depictions because the opinions or views reflected gave offense, then the restriction would raise very serious First Amendment concerns under the principles outlined above.

Assuming that the provision at issue is construed and applied in a viewpoint neutral manner, a question might still remain as to whether the restriction is "reasonable" in this context. Pacifica, which relies on the special justifications for restricting broadcast speech accessible to children, see 438 U.S. at 748-50, offers little support in this respect. But section 332 can readily be justified by reference to its own unique context. For instance, Congress reasonably could decide that decency considerations should be one component[5] of the content-based aesthetic judgments necessarily implicated by an arts-funding program. See Advocates for the Arts, 532 F.2d at 796 ("If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable.").

Sincerely,

Andrew Fois
Assistant Attorney General

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5 See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.")

ORIGINAL with proof of service

No. 97-371

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,

Petitioners,

—v.—

KAREN FINLEY, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND SUPPLEMENTAL BRIEF OF RESPONDENTS

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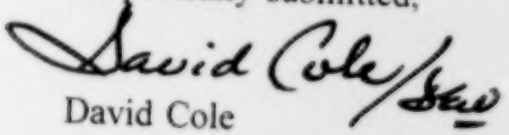
RESPONDENTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Respondents respectfully move for leave to file the attached supplemental brief to address an issue that this Court raised *sua sponte* at oral argument in this matter: whether plaintiffs have standing to sue. The government challenged plaintiffs' standing in the district court, but when the district court ruled that plaintiffs had standing, Pet.App. 70a-74a, the government did not dispute that conclusion in its appeal to the court of appeals, its petition for rehearing, its petition for *certiorari*, or its brief on the merits in this Court. As a result, the Court has not had the benefit of any briefing on

this subject, a subject in which several Justices expressed interest at argument. Moreover, there seemed to be some confusion at the argument regarding whether plaintiffs had been awarded or denied grants under the "decency" regime.

Accordingly, respondents respectfully move for leave to file the attached supplemental brief, which addresses only the issue of plaintiffs' standing to sue.

Respectfully submitted,



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Dated: April 9, 1998

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ARGUMENT

Respondents submit this supplemental brief to address an issue that this Court raised *sua sponte* at oral argument in this matter, namely, whether plaintiffs have standing to sue. That issue was not addressed in any of the parties' briefs because the government elected not to take issue with the district court's conclusion that plaintiffs had standing to sue. Standing is a constitutional requirement, and therefore the government's failure to challenge standing does not mean that the issue is waived. But because the government did not dispute standing, this Court has not had the opportunity to consider the parties' views on the matter in writing.

Respondents' standing is well-established by a line of cases holding that plaintiffs whose speech rights are affected by a statute may challenge the statute on its face even before it is actually applied to them.[1] The reason for this rule is that where a statute on its face threatens First Amendment rights, any delay in judicial resolution of its constitutionality risks the loss of First Amendment freedoms in the meantime. *City of Lakewood v. Plain Dealer Publishing Co.*,

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[1] *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (facial challenge permissible when a statute "vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad"); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988); *Eu v. San Francisco County Cent. Comm.*, 826 F.2d 814, 822 (9th Cir. 1987)(granting pre-enforcement standing to challenge election law); *aff'd*, 489 U.S. 214 (1989); *Ozonoff v. Berzak*, 744 F.2d 224, 227-30 (1st Cir. 1984)(Breyer, J.)(granting standing to doctor to challenge criteria for security clearances for a job with the World Health Organization without requiring doctor to apply for and be denied the security clearance).

486 U.S. at 770 n.11. A First Amendment facial challenge by its nature is addressed to the overall risk of the suppression of ideas imposed by the challenged law. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 197 (1984); *New York State Club Association v. City of New York*, 487 U.S. 1, 11 (1988).

Respondents are four performance artists and the National Association of Artists' Organizations (NAAO), a national association of artists and arts organizations, suing on its own behalf and on behalf of its approximately 600 members. Respondents brought this facial challenge because as individuals and institutions that had sought NEA funding in the past and intended to seek NEA funding in the future, they were chilled in their freedom of expression by the imposition of the "decency and respect" clause on the NEA application review process. The chill was immediate, because as prospective applicants for funding, they had to guess whether their applications, and indeed the work they were currently engaged in, might undermine their chances for funding if an NEA official considered it either "indecent" or "disrespectful" of the American public's "beliefs and values." J.A. 21-27 (Declaration of Charlotte Murphy, Executive Director of National Association of Artists' Organizations).[2]

The chill took various forms for respondents and NAAO members, depending upon where they stood in relation to the application process. Potential applicants were chilled in the art they created even with their own funds, for

[2] In addition to NAAO's standing to sue on behalf of its members, as described herein, the district court properly recognized that NAAO also has standing to sue in its own behalf. Pet.App. 73a.

fear that "indecent" or "disrespectful" work would be considered adversely once they applied for funding. J.A. 23-25 (Murphy Dec.); C.A. E.R. 43, 50 (Declarations of Holly Hughes, Tim Miller). Those who applied for funding were "chilled in their applications and in the scope of their projects by uncertainty about what the standard means or how to comply with it." J.A. 24 (Murphy Dec.). Others had received NEA funding, but were chilled in what they created with that funding, for fear that their projects would fail to comply with the standard. Pet.App. 70a-71a and n.15. And still others were deterred even from applying for NEA funding as long as the "decency and respect" criteria were in effect. C.A. E.R. 31-40 (Declarations of Karen Finley, John Fleck).

In *City of Lakewood*, 486 U.S. 750, this Court held that the Plain Dealer could challenge on its face a municipal ordinance governing the allocation of subsidies to speech -- access to public property for newsracks -- even though the Plain Dealer had never applied for a permit. The Court held that "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *Id.* at 755-56. This rule is necessary to avoid "two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.* at 759. In such circumstances, "waiting for an alleged abuse before considering a facial challenge would achieve nothing except to allow the law to exist temporarily in a limbo of uncertainty and to risk

censorship of free expression in the meantime." *Id.* at 770 n.11.[3]

City of Lakewood controls here. There, as here, the government was allocating optional subsidies to speech: just as the government has no obligation to subsidize artists, it has no obligation to subsidize newspapers by allowing newsracks on its property. There, as here, the law gave a government official "unbridled discretion" concerning whom to subsidize. "General standards of decency and respect for the diverse beliefs and values of the American public" specifies no standard of conduct at all. Pet.App. 17a-18a. Indeed, defendants conceded that the statute is "indeterminate" and offers "no way to predict" how it will be implemented. NEA C.A. Br. 31, 39. Thus, the statute accords NEA officials the same unbridled discretion as the mayor had in *City of Lakewood*. And just as the Court in *City of Lakewood* rejected the mayor's claim that he would "act in good faith and adhere to standards absent from the statute's face," 486 U.S. at 770, so here the Court should reject the NEA's (considerably more ambiguous) promise to act in good faith.

In *City of Lakewood*, the Court recognized that the chill caused by such unbridled discretion over allocating benefits to speech "can be alleviated *only through a facial challenge*." *Id.* at 757 (emphasis added). That is even more true here. No one will have better standing than the respondents currently before the Court. The NEA implemented the statute in such a way as to make "as applied" challenges literally impossible, by hiding the ball regarding

[3] *See also Virginia v. American Booksellers Ass'n*, 484 U.S. at 393 (noting danger of self-censorship in authorizing pre-enforcement challenge to statute regulating speech).

the consideration of decency and respect. While NEA panelists were instructed to bring their own standards of decency to the table in judging applications, they were not instructed to make a "separate determination as to whether an application is decent or respectful," but rather to fold that determination into their artistic merit judgment. J.A. 80-81 (Declaration of Randolph McAusland). Applicants therefore had no way of knowing whether their applications had been denied based on "decency or respect," and thus, could not have brought an "as applied" challenge.[4]

[4] An "as applied" challenge would be even more futile were the NEA to implement the statute merely by considering "decency and respect" in selecting diverse panels. The chill created by the criteria would remain -- just as scholars would be chilled if the NEH were to announce that it was taking "political correctness" into account in selecting its panel members -- even though panel decisions would not reflect that applications were denied for "decency and respect" reasons. *Cf. Johnson v. Stuart*, 702 F.2d 193 (9th Cir. 1983)(granting students standing to challenge provision in textbook selection statute barring books critical of founders, where provision was just one of many selection criteria, and students could never show that books were denied under the challenged provision because defendant gave no reasons for denials).

CONCLUSION

For all of these reasons and the reasons stated by the district court, respondents plainly have standing to challenge the "decency and respect" clause on its face. The judgment below should therefore be affirmed.

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